

No. 98-591

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Supreme Court, U.S.

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In the
Supreme Court of the United States
OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX
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(Caption omitted in printing)

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

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REPLY ARGUMENT

I. Plaintiff Raised A Genuine Issue Of Fact As To Whether He Was A Qualified Individual With A Disability Under The Americans With Disabilities Act.

A. Plaintiff Was A “Qualified Individual”

Under the Americans With Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et. seq.*, a “qualified individual with a disability” is one who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The analysis under the ADA is two-step: First, whether the individual satisfies the prerequisites for the position; and, second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. § 1630.2(m). Although Defendant agrees that this two-step analysis is appropriate under the ADA, *see* Defendant’s Answering/Opening Brief (“Defendant’s Brief”) at 12, Defendant’s argument repeatedly muddles the two stages. Under Defendant’s intermingling of the two steps, the prerequisite of DOT certification becomes an essential function of the job of truck driving. That muddled analysis is flawed.

The first step, which is the determination whether an individual satisfies the prerequisites of a position held or desired, raises the issue of whether the individual possesses “the appropriate educational background, employment experience, skills, licenses, etc.” Appendix to 29 C.F.R. §

1630.2(m).

Here, Plaintiff possessed the necessary prerequisites. He possessed the appropriate employment experience, he had years of employment driving trucks from 1979 through 1992. Plaintiff’s Opening Brief at 3. He possessed the appropriate educational background having obtained an associates degree. CR 27 at 16. He possessed the necessary skills, for he had a good driving record, had never been in an accident that was his fault and had no disqualifying moving violations on his record. Plaintiff’s Opening Brief at 3-4. According to his doctor the amblyopia in his left eye does not interfere with his ability to drive. CR 27 at 9, 137; Aff. Of Beatrice Michael; Ex. 24. Finally, Plaintiff possessed the appropriate licenses, for he either held a valid DOT card or later obtained a DOT vision waiver and obtained such a card. CR 27, 31, 32, 117, 119, 136. Thus, Plaintiff possessed the necessary prerequisites of the job including a valid DOT card, that is DOT certification. As demonstrated in Plaintiff’s Opening Brief there is a question of fact as to whether the DOT certification or the vision acuity provisions within DOT regulations constitute the legitimate prerequisites of the job. Plaintiff’s Opening Brief at 14-15.

Plaintiff’s undisputed satisfaction of the prerequisite of a DOT card is why Plaintiff’s argument that the DOT certification was Defendant’s prerequisite, and not the underlying DOT vision specifications, is compelling at summary judgment. If the DOT certification is the prerequisite, not the vision requirements themselves, then a DOT vision waiver is a reasonable accommodation and an individual assessment is necessary. See discussion of reasonable accommodation, *infra*. Here, it is undisputed that an individual assessment was not made. In any event, Defendant fails to negate the question of fact raised by Plaintiff as to whether the DOT certification was Defendant’s prerequisite for the job as opposed to the physical vision acuity specifications set forth by DOT in 49 C.F.R. §

391.41(b)(10).¹

As demonstrated in Plaintiff's Opening Brief, at pages 14-15, there is a question of fact as to whether it is DOT certification that is a prerequisite to the position, or whether the prerequisite is meeting the underlying physical requirements for vision acuity contained in DOT regulations. The evidence adduced, viewed in the light most favorable to Plaintiff, is that Defendant's drivers are to be certified by the Department of Transportation and that Defendant never specifically adopted DOT's physical requirements as Defendant's own. Nor did it enforce those physical requirements regarding Plaintiff prior to his injury. CR 27, p. 82-84, 109, 115. Struggle as Defendant does in its Brief it fails to dispel the question of fact raised by Plaintiff as to whether the DOT vision requirements themselves are the prerequisites. Defendant cannot avoid that Plaintiff was hired to drive in 1990 despite a recorded corrected vision that did not meet DOT specifications and permitted to drive in 1991 despite a worse recorded corrected vision and that these reports of supposedly deficient vision did not disqualify Plaintiff. CR 27, at 60-62, 110, 111-112, 115-116, 119, 123-124, 136; CR 44 at 5-9; ER 181-186. Indeed, Mr. Riddle testified Defendant would accept changes in DOT minimum requirements, thus indicating it was DOT certification, not the specified vision acuity standards, that was the prerequisite to the job. CR 27, p. 84. Despite Defendant's efforts there remains a question of fact as to whether Plaintiff met the legitimate prerequisites of the position, or could have with the accommodation of leave to obtain, and acceptance of, a DOT vision waiver.

¹49 C.F.R. § 391.41(b)(10) provides in part: "Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses"

The second step of the analysis of whether an individual is a qualified individual with a disability requires an examination of whether Plaintiff could perform the essential functions of the job held or desired. When defined properly the essential function of the job in question was interstate truck driving. Plaintiff's Brief at 16; Defendant's Brief at 17 ("The essential function and purpose of the position is driving to transport groceries and other goods between states."). The undisputed fact is that Plaintiff had satisfactorily performed those essential functions for Defendant from August 21, 1990 through December 3, 1991, and had performed similar jobs successfully for years before his employment, with the vision impairment he had since birth. *See Plaintiff's Opening Brief at 16-17.* There is at least a question of fact as to whether Plaintiff could perform the essential functions of the job of interstate truck driving.

B. Plaintiff Was A Disabled Individual. His Vision Impairment Was Regarded As Substantially Limiting Seeing Or Working

On appeal, Defendant for the first time raises the issue of whether Plaintiff was a disabled individual under the ADA. Def.'s Brief at 20-24. Having not raised this issue below Defendant should not now be allowed to argue the record is deficient regarding this issue.² *See Spurlock v. F.B.I.*, 69 F.3d

²In Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment, CR 26 at p. 11, Plaintiff stated, "Here, Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather Defendant argues Plaintiff is not an otherwise qualified individual." Defendant did not refute that statement in its Reply. CR 42. Indeed, in its Reply Defendant states, "Albertson's moves for summary judgment in its favor on the ground that Mr. Kirkingburg was not 'otherwise qualified' to perform the job of truck driver with or without reasonable

1010, 1017 (9th Cir. 1995).

Despite the fact that Defendant did not raise the issue below, Plaintiff adduced evidence that he was a disabled individual under the Act. A disability means a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(2) (emphasis supplied); *see* 29 C.F.R. § 1630.2(g)(1)-(3). Here, Plaintiff presented evidence establishing that he had 20/200 corrected vision in his left eye and 20/20 corrected vision in his right eye. CR 27, p. 9; ER 22. That physical impairment is not disputed. Significantly, in addition, there is evidence that Mr. Riddle regarded Plaintiff as "legally blind or blind in one eye." CR 27 at 110; Sturgill Depo. 25; ER 121. Someone who is, or is regarded as, legally blind or blind is disabled under the ADA. *See Norcross v. Sneed*, 573 F.Supp. 533, 536 (W.D. Ark. 1983), *aff'd* 755 F.2d 113 (8th Cir.) (legally blind individual is handicapped under the Rehabilitation Act); *Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd.*, 556 F.2d 184 (3rd Cir. 1977). Mr. Riddle's statement that Plaintiff was "legally blind or blind in one eye" is evidence he regarded Plaintiff as having an impairment that substantially limited the life activity of seeing. Under the statutory definition of disabled, being so regarded is sufficient for Plaintiff to be protected under the ADA. Plaintiff need not prove his impairment actually limited major life activities.

Mr. Sturgill's testimony that there was no other reason than Plaintiff's vision impairment for Plaintiff's termination is evidence that Plaintiff was regarded as having an impairment that substantially limited the major life activity of working. Due to Plaintiff's vision impairment he was regarded as unable to perform an entire class or type of work, that is,

accommodation." CR 42, at 2; Memorandum In Support Of Amended Motion For Summary Judgment.

interstate truck driving or any other position involving driving. Being regarded as unable to perform a class or type of work due to an impairment is sufficient to be regarded as having an impairment that substantially limits the major life activity of work. 29 C.F.R. § 1630.2(j)(3)(I); *Leslie v. St. Vincent New Hope, Inc.*, 916 F.Supp. 879, 885 (S.D. Ind. 1996) (inability to perform a "wide range of jobs" is sufficient to substantially limit working); *see E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Haw. 1980) (under Rehabilitation Act the standard of limits employment does not mean limits employment generally); *see also Winnett v. City of Portland*, 118 Or. App. 437, 447, 847 P.2d 902 (1993) (under Oregon disability discrimination law patterned on the Rehabilitation Act an impairment that substantially limits the performance of "the work involved" satisfies the statutory criteria of a disability).

Here, there is evidence that Plaintiff was excluded from any job with Defendant involving driving not just one particular truck driving job. Thus, Defendant's reliance on *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1104 (1995) is misplaced. This is not a case where the "single job" exclusion to substantially limiting working, as articulated in 29 C.F.R. 1630.2(j)(3)(I), applies. *See Leslie, supra* (distinguishing *Bolton, supra*). Thus, Defendant's argument that Plaintiff is not disabled under the ADA is factually and legally flawed and should be rejected by this court, if this court addresses it at all.

II. The District Court Erred By Holding As A Matter Of Law There Was No Reasonable Accommodation Possible.

A. A Vision Waiver Is A Reasonable Accommodation

The district court's holding that "[n]o reasonable accommodation is possible" implicitly relies upon its finding that the "vision waiver program is a flawed experiment that

has not altered the DOT vision requirements." CR 48, Opinion at 7, at ER 218. The district court, and Defendant in its Brief, rely heavily upon the holding in *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288 (D.C. Cir. 1994). Both the court and Defendant read *Advocates* too broadly. In *Advocates* the court did not rule the vision waiver was flawed or risked public safety. Rather, the court concluded that "The FHWA [Federal Highway Administration] has failed to meet the exacting requirements of section 2505(f)," which sets forth the prerequisites of granting a waiver. 28 F.3d at 1294. The court therefore held that the FHWA's adoption of the waiver program was contrary to law and it vacated and remanded the rule to the agency. *Id.* In short, the court did not invalidate the principle of a vision waiver program, it simply held the FHWA had not met the legal requirements of establishing one at the time it had created the program.

On remand the agency determined that it would continue vision waivers for the approximately 2,399 drivers in the program, thus including Plaintiff, until March 31, 1996. 59 Fed. Reg. 59386, 59387 (1994). Although the district court and Defendant on appeal acknowledge the agency's action, both fail to recognize the significance of the agency's final determination. In the agency's final determination entitled "Qualifications of Drivers; Vision Deficiencies; Waivers" it determined:

"that the issuance of waivers to the 2,399 drivers [thus including Plaintiff] remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles. This determination is based on studies referred to herein and data gathered during the course of the last two years which support the proposition that a group of experienced drivers of commercial motor vehicles with clean driving records, including both accident and citation records over the previous three years, will

present a lower risk to safety over the following three years than a group of the same size comprised of drivers representing the general truck driving population, including new drivers, over the same three-year period. The statistics that have been gathered from the waived drivers to date indicate that this class of drivers has performed and continues to perform more safely than those drivers in the general population of commercial drivers.

* * *

In addition, the FHWA believes that the continued employment of individuals with proven safe driving records is in the public interest. . . . Permitting waived drivers to continue operating in interstate commerce is also consistent with the public interest policy of employing persons with disabilities, which is evidenced in both the Rehabilitation Act of 1973 and the Americans with Disabilities Act."

59 Fed. Reg. 59386, 59389, *see* Appellant's Addendum page 15.³ Thus, on remand the agency determined that continuation of the vision waiver program was consistent with the public interest and the safe operation of commercial vehicles. Given this determination, the district court erred when it held as a matter of law that the proposed accommodation of a vision waiver would be futile because even with that accommodation

³Notably, one of the comments favoring continuing the vision waiver program from the State of Indiana Department of Motor Vehicles "emphasizes the importance of the vision waiver as a tool to accurately assess the vision standards of commercial drivers, specifically addressing the condition known as amblyopia, or 'lazy eye.' The State acknowledges that persons with less than perfect vision often develop scanning techniques to compensate for their disability, and that such techniques may actually increase their awareness of traffic and other conditions." 59 Fed. Reg. *supra* at 59386-59387.

or any other, Plaintiff could not safely perform the essential function of truck driving. The Department of Transportation had determined that the screening requirements of the vision waiver program would meet the safety requirements dictated by the public interest and thus in certain cases the vision requirements of 49 C.F.R. § 391.41(b)(10) need not be met. Given the Department of Transportation's position regarding the alternative vision standards set forth in the vision waiver program, the issue of possible reasonable accommodation should not have been decided as a matter of law. Generally, the reasonableness of an accommodation is an issue for the jury. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 997 (D. Or. 1994).

Properly analyzed, the issue of "direct threat to safety," as established in 42 U.S.C. § 12113(b) and explained in 29 C.F.R. § 1630.2(r), is a defense with the burden on the defendant to establish the significant risk of substantial harm to the health or safety of the individual or others. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) ("As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat."); *E.E.O.C. v. Chrysler Corp.*, 917 F.Supp. 1164, 1170-1171 (E.D. Mich. 1996). "Therefore, to prevail at summary judgment on the direct threat issue, [the defendant] must prove that [the plaintiff] is a direct threat as a matter of law." 84 F.3d at 764. Significantly, generally "whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all the evidence about the nature of the risk and the potential harm". *Rizzo, supra* at 764.

Here, Defendant did not present any evidence regarding the issue of direct threat except the specifics of Plaintiff's vision acuity and the specifications of the DOT regulations regarding vision acuity. Instead of a factual examination of

Plaintiff's particular condition Defendant relied upon case law from other federal circuits to argue that since Plaintiff's vision acuity did not meet the DOT specifications in 49 C.F.R. § 391.41(b)(10), Plaintiff was therefore a direct safety risk. The district court erred in adopting that reasoning.

The case law relied upon by Defendant and the district court is readily distinguishable. In *Buck v. United States Department of Transportation*, 56 F.3d 1406 (D.C. Cir. 1995) the court held that the Rehabilitation Act did not require the FHWA to allow individual truck drivers who failed to meet DOT hearing requirements to try and meet the standard when there is no way in which an individual with a certain condition could meet the standard. 56 F.3d at 1408. The court reasoned: "Once an individual has admitted that he does not meet such a necessary - as opposed to a merely convenient - standard, the Rehabilitation Act does not forbid the application to him of a general rule." *Id.* (emphasis added). The clear distinction between *Buck* and the present case is that here there is an exception, that is the waiver program, created by the agency to its general rule. There are basically two vision standards, not just one, in the present case: (1) the vision acuity specifications set forth in 49 C.F.R. § 391.41(b)(10); and, (2) the provisions of the vision waiver program.⁴ 57 Fed. Reg. 31458, 31460 (1992). (See Appellant's Addendum at 3.) Thus, here the standards of the general rule established in 49 C.F.R. § 391.41(b)(10) cannot be followed to the exclusion of the standards established in the waiver program. Since

⁴The standards for participation in the vision waiver program were that applicants: held a valid state commercial license; had three years' recent experience driving a commercial vehicle without moving violation citations, license suspension, or driving-related convictions; and presented proof from an optometrist or ophthalmologist certifying the applicant met certain vision requirements and that the applicant is "able to perform the driving tasks required to operate a commercial motor vehicle." 57 Fed. Reg. at 31460.

Plaintiff fell within the exception to the general rule it was and is inappropriate to universally apply the general rule as a matter of law.

Likewise, in *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992), the court allowed the Department of Transportation to rely upon its general rule in 49 C.F.R. § 391.41(b)(8) prohibiting anyone with a medical history or clinical diagnosis of epilepsy from driving a commercial vehicle in interstate commerce. The court ruled that the DOT's denial of the plaintiff's request to waive the requirement did not violate the Rehabilitation Act. But, as in *Buck*, in *Ward* there was no established waiver program. Thus, *Ward* is as unpersuasive as *Buck*.

Finally, *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) is also unpersuasive. The Fifth Circuit held that "as a matter of law, a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. § 391.41 presents a genuine substantial risk that he could injure himself or others." 2 F.3d 1385 (footnote omitted). However, there are several reasons that holding is not applicable to the present case. First, the holding as to vision impairment is *dicta* for the court found the vision impaired plaintiff failed to establish he was physically disabled or regarded as disabled. 2 F.3d at 1390-1393. Second, the reasoning in *Chandler* relied heavily upon the then historical fact that the standards for diabetes and vision had not been altered since 1970 despite petitions for reconsideration of the provisions set forth in 49 C.F.R. § 391.41. 2 F.3d at 1394-95. Whereas, in the present case, the provisions of 49 C.F.R. 391.41(b)(10) have been reconsidered by the agency and exceptions created for a limited time through the vision waiver program. In addition, in essence the vision waiver program provided the "case by case" determination the *Chandler* court hoped would soon be possible. 2 F.3d at 1395 fn. 52. As one district court stated: "the *Chandler* holding has been undermined by the fact that the FHWA has recently instituted

a waiver program" *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 341 (W.D. Okl. 1994). Given the FHWA's retention of the program on remand from the *Advocates* court, the finding in *Sarsycki, supra*, is still valid despite the ruling in *Advocates, supra*.

The vision waiver program created by the Department of Transportation may be a reasonable accommodation for some individuals. The trial court erred when it held that no reasonable accommodation is possible as a matter of law.

B. Defendant Was Required To Consider Reassignment As A Reasonable Accommodation And Failed To Offer A Reasonable Accommodation.

Under the ADA, reassignment to a desired vacant position may be required as a reasonable accommodation where the employee becomes disabled while employed. *Leslie, supra*, 916 F.Supp. at 887 ("Where other forms of accommodation are not reasonable but reassignment would be reasonable under all the circumstances, the plain language of the ADA may require reassignment even if the employer does not have a regular policy or practice of permitting non-disabled employees to transfer."); 42 U.S.C. § 12111. In its Brief, Defendant argues the offer of the yard hostler position and that of tire man met its duty of reasonable accommodation if one existed. As Plaintiff demonstrated in his Opening Brief no reasonable accommodation was attempted in lieu of accepting the DOT vision waiver. Opening Brief at 19-22. The essential problem with Defendant's position is that there is a question of fact as to whether Plaintiff turned down the yard hostler position (see Plaintiff Affidavit at ER 19, stating he "never turned down the yard hostler position"). Likewise, there is a question of fact as to whether the tire man position qualified as a reasonable accommodation since to be a reasonable accommodation a reassignment needs to be "to an equivalent

position in terms of pay, status, etc." 29 C.F.R. § 1630(2)(o).

There is a genuine issue of fact as to whether Defendant attempted any reasonable accommodation by means of reassignment.

III. The Trial Court Erred When It Held No Individual Assessment Of Plaintiff's Ability To Drive Was Necessary.

The trial court held that Defendant could rely upon the DOT vision standards, meaning the acuity standards in 49 C.F.R. § 391.41(b)(10), and need not make an individual assessment of Plaintiff's ability to drive. Opinion, p. 8, at ER 219, citing *Buck, supra*, and *Ward, supra*. As demonstrated above both *Buck* and *Ward* are not on point given the presence of the DOT vision waiver program. Neither case supports allowing Defendant to rely upon the provisions of 49 C.F.R. § 391.41(b)(10) to avoid a personal assessment of Plaintiff's abilities because at the time DOT regulations provided for an alternative set of vision and performance standards as established in the vision waiver program. 57 Fed. Reg. 31458 (1992).

"The determination that an individual poses a 'direct threat' must be based on an individualized assessment of the individual's ability to perform safely the essential functions of the job." *E.E.O.C. v. Chrysler Corp., supra*, 917 F.Supp. at 1170, citing 29 C.F.R. § 1630.2(r) (regarding diabetic working in an assembly plant); *accord, Rizzo, supra* at 763-764 (regarding hearing impaired bus driver); *Sarsycki v. United Parcel Service, supra*, 862 F.Supp. at 341; *see E.E.O.C. v. Texas Bus Lines*, 923 F. Supp. 865, 980 (S.D. Tex. 1996) ("An employer cannot assert a direct threat defense unless it makes a showing of a reasonable probability of substantial harm.") (case involving obese bus driver). Here, it is undisputed that such an individual assessment was not made. Instead, Defendant argues that the district court correctly

relied upon *Chandler* to hold that an individual assessment was not necessary since as a matter of law all individuals that did not meet the standards of 49 U.S.C. § 391.41(b)(10) are a substantial risk to others. Def.'s Brief at 35-36. The court's reliance on *Chandler*, as well as *Buck, supra* and *Ward, supra*, to negate the need of an individual assessment was wrong. *Sarsycki, supra*.

The case of *E.E.O.C. v. Texas Bus Lines, supra*, is instructive. In *Texas Bus Lines* the defendant required the plaintiff to be certified under the DOT regulations at issue in the present case, 49 C.F.R. § 391. After a physical examination the examining physician disqualified the plaintiff concluding she was morbidly obese. 923 F.Supp. at 967. After examining the provisions of 49 C.F.R. § 391.41, the court found the regulations did not mandate individuals be disqualified due to excessive weight and therefore the defendant improperly relied upon the physician's opinion. *Id.* at 973. The court went on to reject the defendant's argument that based upon *Chandler, supra*, it's refusal to hire the plaintiff was not prohibited by the ADA because the plaintiff was unable to obtain DOT certification. Significantly, in rejecting the *Chandler* based defense the court in *Texas Bus Lines* noted that in *Chandler* and its progeny the disqualifying condition was disqualifying *per se* under FHWA regulations, whereas in the case before it there was no equivalent *per se* disqualification for an obese individual. As in *Texas Bus Lines*, here given the existence of the DOT established vision waiver program at the time of Plaintiff's termination, the vision standards provided in 49 C.F.R. § 391.41 did not constitute a *per se* disqualification.⁵ As Plaintiff was told,

⁵ As the Department of Transportation stated in reference to drivers who did not meet the vision standards in 49 C.F.R. § 391.41(b)(10): "Because they did not meet existing vision standards, these drivers could not be allowed to operate in interstate commerce, unless they obtained waivers" 59 Fed. Reg. 50887, 50889

after he failed to pass the physical examination for DOT certification, he needed a "vision waiver." CR 27 at 40. Since the acuity provisions at the time did not constitute a *per se* disqualification the district court erred in relying upon *Chandler* where the court found the same acuity provisions did constitute a *per se* disqualification.

The better analysis is presented in *Sarsycki v. United Parcel Service, supra*, 862 F.Supp. 336. As in *Sarsycki*, which found *Chandler* to be distinguishable, here the proper analysis is whether Plaintiff presents a direct threat to himself or others. As a matter of law that determination requires an individual assessment "if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." *Sarsycki*, at 341; *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993); *see the discussion in Plaintiff's Opening Brief at 22-25*. Here, it is undisputed no individual assessment was made.

Defendant's attempt to negate *Sarsycki* relies on the holding in *Advocates for Highway v. Federal Highway Safety, supra*, 28 F.3d 1288. The flaw in Defendant's argument, and the district court's acceptance of it, is that the court in *Advocates* did not find the vision waiver program was inherently unsafe or flawed. Rather, the court merely found the FHWA did not have the statutorily required empirical evidence in the record to support its statutorily required determination that the waiver program would not adversely effect the safe operation of commercial vehicles. In essence, the waiver program was vacated on a procedural technicality. 28 F.3d at 1294. To rely upon that holding to negate the existence of the program is an error. This is especially true given the agency's subsequent affirmation of the program.

The lower court erred in following *Chandler, supra*, and

(1994)(emphasis added). Thus, while the waiver program existed, the then current vision standards did not constitute a *per se* disqualification.

rejecting *Sarsycki, supra*. An individual assessment of Plaintiff's abilities is required under the ADA, given the then existing waiver program.

IV. The Trial Court Erred In Holding Defendant Did Not Have A Combined Statutory Duty To Use Reasonable Accommodation To Facilitate Plaintiff's Return To Work As An Injured Worker.

Defendant argues that Plaintiff raises the issue of reasonable accommodation to facilitate Plaintiff's return as an injured worker for the first time on appeal. Defendant is simply wrong.

The issue was raised in Plaintiff's Amended Complaint. Amended Complaint, ¶ 8, 9(c). In the Amended Complaint it is alleged Plaintiff "sustained a compensable injury" and that "Defendant failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work." "Compensable injury" and "suitable work" are terms of art found in Oregon's statutory requirement of reinstatement of injured workers. *See* ORS 659.415; ORS 659.420.

Plaintiff specifically raised the issue of reasonable accommodation tied to reassignment to a "suitable" position, which he was entitled to as an injured worker, in his Response To Defendant's Motion For Summary Judgment. *See* CR 26, at 18-19. In that Memorandum Plaintiff expressly stated: "In the present case, there is an additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodations in that new position. Here Plaintiff was an injured worker. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420." *Id.* at 18 (factual citations omitted).

Furthermore, this dual statutory obligation was the basis for Plaintiff's motion for reconsideration. CR 50 at ER 221.

Defendant is categorically wrong when it argues this issue

was not previously raised.

Under ORS 659.415 Plaintiff had reinstatement rights to his former position and if that "former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable." ORS 659.415(1).⁶ The reference in the state statute to not being disabled in context refers to the nature of the injured worker's medical release. Compare ORS 659.415 to ORS 659.420. If an injured worker is fully released to work he is not disabled from performing the duties of the position and ORS 659.415 applies. That is the situation in the present case. In contrast, if a worker does not receive a full or complete medical release to return to work the injured worker is disabled for purposes of the statute and ORS 659.420 applies. In either situation, if the employer has no suitable jobs vacant at the time of the injured worker's demand to return to work, the employer's obligation to reinstate the worker continues until the employer offers the injured worker the next suitable job that becomes vacant or the worker's reinstatement rights terminate. OAR 839-06-130(3) and (5)(a), OAR 839-06-135(4)(a).

This continuing obligation of the employer to reinstate the injured worker to an alternative suitable position is significant since the district court denied Plaintiff's motion for

⁶ORS 659.415(I) provides: "A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is "available" even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable. A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties."

reconsideration largely on the ground that there was no evidence the yard hostler position was vacant when Plaintiff was terminated. CR 53, Order, p. 2 at ER 224. Using the proper analysis under the injured worker reinstatement statute Defendant's obligation to reinstate Plaintiff to suitable work continued until it did so or until his rights terminated. Under the statute Plaintiff's reinstatement rights did not terminate until three years after the date of injury, in the absence of other factors. ORS 659.415(3)(a)(F). Thus, as an injured worker Plaintiff had ongoing rights to reassignment to any other suitable position and as a disabled individual he had rights to reasonable accommodation in that other suitable position. Defendant was required under state law to return Plaintiff to other suitable employment, but because of its violation of federal law in failing to reasonably accommodate Plaintiff, that return was never effected.

CONCLUSION

For the foregoing reasons and the reasons presented in Plaintiff's Opening Brief, this Court should reverse the district court's grant of Defendant's motion for summary judgment and remand this action for trial.

DATED this 12th day of November, 1996.
Respectfully submitted,

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(Certificate of Service omitted in printing)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG,	)	No. 96-35002
)	
<i>Plaintiff-Appellant,</i>	)	D.C. No.
	)	CV-95-549-PA
v.)	
	)	ORDER AND
ALBERTSONS, INC.,	)	AMENDED
	)	OPINION
<i>Defendant-Appellee.</i>)	
)	

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
July 8, 1997--Portland, Oregon

Filed May 11, 1998
Amended July 1, 1998

Before: Alfred T. Goodwin, Stephen Reinhardt, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Rymer

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that under the Americans with Disabilities Act (ADA), a private employer may not impose Department of Transportation (DOT) visual acuity regulations on a truck driver who has received a waiver of the vision requirements from the Federal Highway Administration (FHWA).

Appellant Hallie Kirkingburg was a commercial truck driver with almost 20 years experience and an impeccable driving record. In 1990, appellee Albertson's, Inc. hired Kirkingburg as a driver. A physician certified that his vision met the requirements of DOT regulations. Kirkingburg performed well on a 16-mile road test, and earned an evaluation of "superior driving skill" from an Albertson's transportation manager.

Kirkingburg had poor visual acuity (20/200) in his left eye, and was deemed monocular, due to an uncorrectable condition. His left-eye acuity rating was below DOT general regulations, but the rating of his right eye was 20/20 with corrective lenses.

After Kirkingburg was on the job for over a year, he suffered a non-driving injury and did not return to work for almost a year. When he returned, Kirkingburg had to

be recertified. This time, the examining physician determined that his left-eye acuity was 20/200 and refused to certify him.

Kirkingburg applied for a waiver of the DOT vision requirements under the FHWA's vision waiver program, which was instituted to bring DOT standards into compliance with the ADA. To obtain the waiver, Kirkingburg had to show that he was a commercial driver, could drive well despite his monocular vision, and had a good driving record. Kirkingburg informed Albertson's that he had applied for the waiver.

Albertson's fired him on the ground that all its drivers had to meet or exceed DOT standards.

Kirkingburg obtained the FHWA waiver, but Albertson's refused to reconsider his discharge.

Kirkingburg sued Albertson's under the ADA. Albertson's contended that he was not entitled to relief under the ADA because he was not "disabled" within the meaning of the statute, and if he was, he was not "otherwise qualified" for the position of truck driver. With respect to its job-related requirements, Albertson's asserted that federal law mandated that its drivers meet the regular DOT vision requirements, that it had the right to adopt the regular DOT standards as its own, and that its refusal to accept FHWA waivers was justified because drivers who do not meet the basic standards pose a direct threat to safety.

The district court granted summary judgment for Albertson's, concluding that Kirkingburg failed to

establish a *prima facie* case under the ADA. Kirkingburg appealed.

[1] To survive a motion for summary judgment, Kirkingburg had to demonstrate a genuine issue of material fact regarding whether he was a disabled person within the meaning of the ADA; whether he was otherwise qualified for the position, that is, whether he was able to perform the essential functions of his job, with or without reasonable accommodation; and whether the employer terminated him because of his disability.

[2] The ADA states that a "disability" is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. Under implementing regulations, an impairment is substantially limiting if it significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity, as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity. Major life activities include seeing.

[3] Kirkingburg presented uncontested evidence that he suffered from a condition resulting in his being almost totally blind in his left eye. There was no question that Kirkingburg was substantially limited in the major life activity of seeing. Although his body compensated for his disability, the *manner* in which he saw differed significantly from the *manner* in which most people see. Kirkingburg saw using only one eye; most people see

using two. Under the statute and implementing regulations, Kirkingburg was therefore disabled, if the facts were as he alleged.

[4] Albertson's contention that Kirkingburg was not disabled because he was not totally blind was inconsistent with the expansive goals of the ADA, which was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination.

[5] An expansive reading of the statutory definition of "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities.

[6] There existed a genuine issue of material fact regarding whether Albertson's perceived Kirkingburg as disabled. Even if Kirkingburg were not disabled, his employer's perception of him as having a disability would have been sufficient to bring him under the coverage of the ADA. Because Kirkingburg presented evidence that one of the Albertson's managers described him as "blind in one eye or legally blind," he established a genuine issue as to whether his employer believed that he was disabled.

[7] Under the ADA, Kirkingburg had to show that he was a "qualified individual." In this regard, Kirkingburg had to establish that he satisfied the requisite skill,

experience, education, and other job-related requirements of the employment position that he held, and that with or without reasonable accommodation, he could perform the essential functions of his position.

[8] Kirkingburg established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver. There was no question that Kirkingburg's experience, and in particular his year of experience as a driver for Albertson's, was evidence from which a reasonable factfinder could have concluded that Kirkingburg was able to perform the essential functions of the job. More pertinent was the fact that Kirkingburg received a FHWA waiver based in part on his excellent driving record.

[9] The dispositive question was whether Albertson's job-related requirement that Kirkingburg failed to meet was lawful as applied. Albertson's maintained that Kirkingburg could not show that he was qualified because he could not fulfill its requirement of meeting or exceeding the regular DOT vision standards.

[10] Because the FHWA waiver program is part of federal law, and recognizing FHWA waivers is consistent with federal law, Albertson's could not justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's did not simply conform its job requirements to the DOT regulations; it chose to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept the FHWA waivers, Albertson's rejected a portion of the federal scheme that was designed to eliminate the discriminatory effects of DOT safety regulations and bring them into compliance with the ADA.

[12] Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there was no evidence that Albertson's believed the waiver program to be invalid, or that it relied on any such belief as a basis for its refusal to accept the FHWA waiver, it was unnecessary to decide whether such a belief would have shielded it from liability.

[13] Albertson's failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat. Under the statute, a direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. A "significant risk" means a high probability of harm that is neither remote nor speculative. Drivers who qualify for the waiver program have established that they do not pose a safety threat. Denying a monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of discrimination that the ADA sought to abolish.

[14] The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA, and serves to protect disabled persons against unfounded discrimination. Individuals who

secure waivers have been determined to be safe drivers. However one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by FHWA to be capable of performing the job of commercial truck driver are incapable of performing it by virtue of their disability.

Judge Rymer dissented, taking the position that under the ADA, complying with current DOT safety requirements was an essential function of Kirkingburg's job.

COUNSEL

Scott N. Hunt, Portland, Oregon, for the plaintiff-appellant.

Corbett Gordon, Portland, Oregon, for the defendant-appellee.

ORDER

The opinion in this case is amended as follows:

At Slip op. 4623, the first full paragraph, reading "Under the ADA, an employer is prohibited", is DELETED.

OPINION

REINHARDT, Circuit Judge:

Hallie Kirkingburg, a monocular-visioned truck driver, filed an action in district court alleging that his employer, Albertson's, Inc. discriminated against him on account of his visual disability in violation of the Americans with Disabilities Act ("ADA" or "the Act"). 42 U.S.C. § 12112(a) (1994). Albertson's moved for summary judgment, arguing that Kirkingburg had not established a *prima facie* case under the ADA. The district court agreed with Albertson's and granted summary judgment in its favor. Kirkingburg appeals. We hold that the granting of summary judgment to Albertson's was erroneous.

The Facts

Since 1979, Hallie Kirkingburg has been driving commercial trucks. His driving record is impeccable -- he has been in only one accident, which was determined to be not his fault, and he has received no citations for moving violations. In 1990, Albertson's hired Kirkingburg as a driver at its distribution center in Portland, Oregon. Prior to starting work for Albertson's, Kirkingburg was examined by a physician who certified that his vision met the requirements established under

Department of Transportation ("DOT") regulations.¹ Kirkingburg also performed well on a 16-mile road test that Albertson's administered before it offered him the job. Following the road test, Albertson's transportation manager stated that "It is my considered opinion that [t]his driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Several months into the job, Kirkingburg was again examined by a physician and his vision was recertified.² Notwithstanding these medical certifications, the visual acuity of Kirkingburg's left eye is, and has been since birth, rated 20/200, well below what the general DOT regulations require. The poor vision in his left eye is caused by amblyopia, a condition commonly referred to as "lazy eye," which cannot be corrected. His right eye, however, has a visual acuity rating of 20/20 (with corrective lenses). In short, Kirkingburg's vision is monocular.

In late 1991, after he had been on the job for over a year, Kirkingburg suffered a nondriving, work-related

1 According to the DOT regulations, operators of commercial motor vehicles should have a "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10).

2 Both medical examinations revealed that Kirkingburg's vision did not meet the applicable standards; neither examination, however, correctly appraised Kirkingburg's actual visual acuity. It is not clear why Kirkingburg received a certification on these two occasions in spite of his failure to meet the required standards.

injury when he fell from a truck. As a result of the accident, he did not return to work for almost a year. Albertson's policies require employees who are resuming work after a long-term absence to secure recertification under the DOT standards, and in November 1992, Kirkingburg's vision was again examined. This time, the examining physician correctly determined that the vision in Kirkingburg's left eye was 20/200. Accordingly, the doctor refused to certify him under the DOT regulations and informed Albertson's of these findings.

When Kirkingburg was denied DOT certification, he applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program, which was instituted in order to bring DOT's standards into compliance with the ADA without sacrificing highway safety. The establishment of this program fulfilled Congress's expectation that DOT would revise its safety regulations in order to end unfounded discrimination against drivers with visual disabilities. *See generally Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715 (8th Cir. 1996) (detailing the history of the FHWA vision waiver program). Under the program, FHWA makes vision waivers available to certain experienced commercial truck drivers who have clean driving records.

In order to obtain a vision waiver under the FHWA program, the applicant, among other things, is required to establish that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a

moving violation, and (3) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). In addition, the applicant is required to present proof from an optometrist certifying that his visual deficiency has not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460. In other words, DOT will waive its regular vision requirements for commercial vehicle drivers, such as Kirkingburg, who have monocular vision, are able to drive well despite that disability, and have good driving records.

Kirkingburg informed Albertson's that he had applied for a waiver under the program, but Albertson's explained that it would not accept a waiver because it had a policy of employing only drivers who "meet or exceed the minimum DOT standards." Consequently, Albertson's fired Kirkingburg from his position as a truck driver. Several months later, when Kirkingburg informed Albertson's that he had in fact obtained a vision waiver, Albertson's once again refused to accept it and declined to reconsider his termination. Kirkingburg brought suit, alleging that Albertson's discriminated against him in violation of the ADA.

DISCUSSION

The Americans with Disabilities Act

When Congress enacted the Americans with Disabilities Act in 1990, it sought to eliminate the barriers

that prevent disabled individuals from becoming fully participating members in all aspects of their communities, particularly in the area of employment. In furtherance of Congress's expansively stated goal of equality, the Act prohibits covered employers from engaging in employment practices that discriminate against individuals with disabilities. Specifically, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). The ADA contemplates that a person with a disability will be evaluated on the basis of his individual capabilities, not on the basis of society's biases or an employer's preconceptions.

[1] In this case, Kirkingburg claims that his employer violated the ADA by firing him because of his visual disability. In order to survive a motion for summary judgment, Kirkingburg must demonstrate a genuine issue of material fact regarding: (1) whether he is a disabled person within the meaning of the ADA; (2) whether he is otherwise qualified for the position, that is, whether he is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) whether the employer terminated him because of his disability.

Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996). Albertson's contends that Kirkingburg is not entitled to relief under the ADA because he is neither disabled nor an otherwise qualified individual. We examine whether Albertson's has established that it is

entitled to summary judgment with respect to these two elements of Kirkingburg's ADA claim.³

1. Disabled

Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled within the meaning of the ADA. We disagree with Albertson's argument that anything short of "legal blindness" in both eyes is insufficient to establish a disability under the ADA -- it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act.

[2] In determining what constitutes a disability under the ADA, we are guided by the definition of the term in the statute, which states that a "disability" is:

- (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The implementing regulations further clarify the statutory definition of a disability. Under the regulations, an impairment is substantially

³ There is no dispute regarding the third element of Kirkingburg's ADA claim; if he is disabled, he was terminated because of the disability.

limiting if it “significantly restricts as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(1)(ii) (1993) (emphasis added). Major life activities include “functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working.” *Id.* at § 1630.2(j) (emphasis added). In addition, the regulations enumerate the following factors that should be considered in determining whether an individual is substantially limited in a major life activity: “(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” *Id.* at § 1630.2(j)(2).

[3] Kirkingburg has presented uncontested evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg’s inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using

only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled.

The Eighth Circuit recently decided an almost identical question. In *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998), that court held that a monocular-visioned person, who could see out of only one eye because of glaucoma, was “disabled.” That the individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects did not change his disabled status. *Id.* at 627-28. It was enough to warrant a finding of disability, the court held, that the plaintiff could see out of only one eye: the *manner* in which he performed the major life activity of seeing was different.⁴ *Id.* at 627.

[4] Albertson’s contention that Kirkingburg is not disabled because he is not totally blind is plainly

4 Recently, the Fifth Circuit held as a matter of law that a monocular-visioned individual was not disabled because he was “able to perform normal daily activities.” *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997). We think this reasoning is inconsistent not only with the regulations, but with the Act itself. Whether an individual is disabled within the meaning of the Act does not depend, contrary to the Fifth Circuit’s suggestion, on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons. Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(1)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit’s analysis and reject the Fifth Circuit’s.

inconsistent with the expansive goals of the ADA. The Act was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities.

See Arnold v. United Parcel Svc., Inc., 1998 WL 63505, at *7 (1st Cir., Feb. 20, 1998) ("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

[5] We also note that an expansive reading of the statutory definition of a "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain in service any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities. The Act contains several provisions that adequately protect the employer's interests. For example, an individual seeking the protection of the Act must demonstrate that he is "qualified" for the job in spite of his impairment. 42 U.S.C. §§ 12111(8), 12112(a). And, if accommodations are necessary to enable the employee to perform the essential functions of the job, an employer will only be required to make such accommodations if they are "reasonable," in light of the costs or other burdens they impose on the employer. *Id.* at § 12111(9), (10).

[6] As an alternative ground for our decision, we note that there exists a genuine issue of fact regarding whether

Albertson's perceived Kirkingburg as disabled. Thus, even if Kirkingburg were not disabled, his employer's perception of him as having a disability would be sufficient to bring him under the coverage of the Act. 42 U.S.C. § 12102(2)(c). Because Kirkingburg has presented evidence showing that one of Albertson's managers described him as "blind in one eye or legally blind," he has established a genuine issue as to whether his employer believed he was disabled.

2. Qualified

[7] Under the ADA, Kirkingburg must show not only that he suffers from a disability, but also that he is a "qualified individual." *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). In this regard, Kirkingburg must establish (1) that he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds," and (2) that with or without reasonable accommodation, he can perform the essential functions of the position. 29 C.F.R. § 1630.2(m); *see also Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (elaborating on the proper inquiry). We address the two requirements, beginning with the latter.

a. Essential Functions

[8] Kirkingburg has, at the least, established a genuine issue of material fact with respect to whether he can perform the essential functions of a commercial truck driver. The regulations define the term "essential functions" to mean: "the fundamental job duties of the

employment position." 29 C.F.R. § 1630.2(n). There is no question that Kirkingburg's experience as a commercial truck driver, and in particular his year of experience as a truck driver for Albertson's, is evidence from which a reasonable factfinder could conclude that Kirkingburg is able to perform the essential functions of the job. More pertinent to the issues in this case, as we will discuss more fully below, is the fact that Kirkingburg received a FHWA waiver based in part on his excellent driving record.

Albertson's maintains that an "essential function" of the job is Kirkingburg's ability to meet DOT safety regulations and that because he cannot meet the standards, he is unable to perform an essential function. We think this argument is more properly considered as a challenge to whether Kirkingburg has satisfied the job-related requirements. Accordingly, we turn to that issue.

b. Job-related Requirements

[9] In one sense, the question in this case is the traditional one -- whether Kirkingburg satisfies the first prong of the "otherwise qualified" test, that is, whether he can satisfy the pertinent job-related requirements. Ultimately, however, the dispositive question is actually whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied.

Albertson's maintains that Kirkingburg cannot show that he is qualified because he cannot fulfill its requirement of meeting or exceeding the regular DOT vision standards. In this respect, Albertson's makes two separate arguments. First, it contends that federal law mandates

that it require that its drivers meet the regular DOT vision standards.⁵ Second, it asserts that, independent of its obligation to ensure compliance with federal law, it has the right to adopt the regular DOT vision standards as its own, and that its refusal to accept FHWA waivers is justified because drivers who do not meet the basic standards pose a direct safety threat. In turn, Kirkingburg challenges the legality of Albertson's requirements and its refusal to recognize his FHWA waiver.

(i) Compliance with Federal Law

[10] As to Albertson's first contention, we think the answer is obvious. Because the FHWA waiver program is part of federal law and recognizing FHWA waivers is

⁵ Albertson's invokes *Buck v. United States Dep't of Transp.*, 56 F.3d 1406 (D.C. Cir. 1995), for the proposition that it should not be compelled to employ a driver who cannot satisfy the regular federal safety standards. In *Buck*, three deaf truck drivers argued that under the Rehabilitation Act (after which the ADA is modeled), "it [was] unlawful for the agency to rely upon a general rule applicable to all hearing-impaired individuals without regard to their actual ability to drive a truck safely." *Id.* at 1408. The D.C. Circuit rejected the petitioners' argument, finding that the implementation of general safety standards by the FHWA and the agency's *refusal* to establish a waiver program is not violative of the Rehabilitation Act if insufficient evidence exists justifying such waivers. *Id.*

Buck is clearly inapposite to this case. Here, the FHWA *has* created a waiver program for vision-impaired drivers. The decision to implement the program was well supported by empirical evidence that a number of drivers who do not meet the otherwise applicable vision standards are nevertheless able to operate commercial vehicles safely. Moreover, the FHWA has determined that Kirkingburg is one of them.

perfectly consistent with federal law, Albertson's cannot justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's has not simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept FHWA waivers, Albertson's has rejected a portion of the federal scheme that was specifically designed to eliminate the discriminatory effects of the DOT safety regulations and bring those regulations into compliance with the ADA. *See Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715, 716-17 (8th Cir. 1996). The waiver program was the result of Congress's expectation that DOT would review its regulations in light of the ADA's mandates and "make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Id.* at 717 (footnote omitted). Allowing Albertson's to prevail in this argument would deal a serious blow to the FHWA's efforts to establish regulations that conform to the requirements of the ADA, in particular the Act's mandate that disabled persons be evaluated in light of their individual abilities.

Apparently hoping to convince us that the waiver program is not a legitimate part of the federal regulatory scheme, Albertson's contends further that it should not be compelled to accept a DOT waiver because: (1) the

waiver program is experimental, and (2) it has been invalidated by the D.C. Circuit. *See Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994). Neither of these arguments is meritorious.

The waiver program, which was instituted in July 1992, has been adjudged a success by the FHWA. *See* 59 Fed. Reg. 59,389 (1994) (determining, after two years of study, "that the issuance of waivers to the 2,399 drivers remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles"). The success of the program is no surprise, given that waiver recipients are selected on the basis of individual evaluations, under exacting standards. Only drivers who have exemplary driving records are eligible. Contrary to what Albertson's would have us believe, there is no evidence whatsoever that drivers who have been certified to drive under the waiver program are less safe than drivers who have been certified under the ordinary standards. In fact, quite the opposite appears to be true. In an interim report, the FHWA concluded that "the driving performance of individuals participating in the vision waiver program is better than the driving performance of all commercial vehicle drivers collectively."⁶ *FHWA Interim Monitoring Report on the*

6 In fact, the excellent safety records of the waiver program participants was cause for reevaluating the program's research methods with respect to its ultimate purpose: to alter the regular vision standards permanently. 59 Fed. Reg. 59386, 59388-90 (1994). To the extent that the program was a "failed experiment," as Albertson's alleges, it was not a failure in terms of the safety performance of those to whom

Drivers of Commercial Motor Vehicles, 3 (1994).

Albertson's also contends that it was not required to accept the FHWA waiver because the D.C. Circuit invalidated the program in 1994. We do not think Albertson's can justify its termination of Kirkingburg and its refusal to accept the waiver on the basis of events that occurred long after its decisions.⁷ See *O'Day v.*

waivers were granted. Its only "flaw" was that preselecting monocular drivers with extraordinary safety records resulted in what may have been unrepresentative and super-safe group of drivers.

Detractors of the program successfully argued to the agency that because only the safest drivers were granted waivers, the safety records of waiver recipients were not reliable indicators of the potential safety records of all monocular-visioned drivers. *Id.* at 59389. Thus, the detractors concluded, the success of the waiver program should not serve as a basis for modifying the regular vision standards so as to render *all* monocular persons qualified to drive commercial trucks. The FHWA agreed and concluded that it needed to adopt a new research method "to develop parameters for performance-based visual standards" that "reflect the actual physical requirements that foster [] safe operation of commercial vehicles." *Id.* at 59389-90. But the agency's decision to change its research methods is of no help to Albertson's in this case, because the decision was based on the highly *successful* track records of the carefully selected group of waiver recipients, including Kirkingburg.

7 In some respects, this question is analogous to that presented in after-acquired evidence cases in which an employer subsequently discovers a lawful justification for its previously unlawful action. See *O'Day*, 79 F.3d at 758. The general rule in those cases is that the employer cannot use such justifications to support the discharge. However, while it is appropriate in those cases to permit the employer to use the evidence in order to limit the amount of damages it must pay, the after-acquired evidence in this case probably would not affect Kirkingburg's damage award, because the new justification does not

McDonnell Douglas Helicopter Co., 79 F.3d 756, 759-61 (explaining that evidence of a justification not known to the employer at the time of discharge cannot serve to justify the termination). Additionally, there is nothing in the record before us that suggests that Albertson's decision in November 1992 not to accept the waiver was based on its belief that the program had been invalidly adopted. Instead, on the record before us, it is undisputed that when Albertson's terminated Kirkingburg and refused to accept the waiver, it was *not* because it believed that the program had been invalidly adopted. Rather, the record reflects that Albertson's refused to accept the waiver simply because it believed that it could continue to require its drivers to meet the regular DOT vision standards notwithstanding the lawful issuance of a waiver by the FHWA. In a letter to the Oregon Bureau of Labor & Industries, dated August 23, 1993, Albertson's stated: "Albertson's does not employ drivers who do not meet minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does not mean that he meets the minimum qualifications of a DOT driver."

[12] As we discussed above, Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there is no evidence in the record indicating that Albertson's believed the waiver program to be invalid when it terminated Kirkingburg or that it relied upon any such

involve employee wrongdoing and the FHWA revalidated the waiver program following the D.C. Circuit's decision.

belief as a basis for its refusal to accept the FHWA waiver, we need not decide whether such a belief would shield it from liability, or whether it might instead have been required to challenge the validity of the waiver program in an administrative proceeding. We leave these questions to the district court should they become relevant on remand. We emphasize that because we are reviewing a summary judgment motion, we do not finally resolve any issues that may be dependent on the introduction of further admissible evidence at trial.

In any event, the D.C. Circuit invalidated the waiver program in 1994 not because it was inconsistent with public safety, but because the FHWA instituted the program without complying adequately with administrative procedures. *See Advocates*, 28 F.3d at 1294. When the case was remanded to the FHWA for further consideration after the court's decision, the agency conducted the appropriate notice and comment procedures and once again concluded that the waiver program was a desirable measure in light of both safety concerns and the goals of the ADA. No challenge has been made to that decision, and the statutory provision allowing the FHWA to grant waivers to vision-impaired drivers remains in effect. 49 U.S.C. § 31136(e)(1). In fact, last year, the FHWA granted at least one waiver to a monocular-visioned driver. 62 Fed. Reg. 35,881 (1997). Thus, we reject Albertson's argument that the waiver program is not a lawful and legitimate part of the DOT

regulatory scheme.⁸

(ii) Direct Safety Threat

Alternatively, Albertson's maintains that its independent adoption of the regular DOT vision standards without the waiver provision, as a job-related requirement, is consistent with the ADA. It asserts that requiring compliance with the regular DOT vision standards is necessary to prevent visually-impaired employees from "pos[ing] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). In other words, it argues that recognizing the FHWA waivers would constitute a direct safety hazard.

The practical effect of Albertson's argument is to seek to have us declare the waiver program invalid. We seriously question our jurisdiction to do so in the context of these proceedings. We doubt that a business that operates in the highly regulated commercial transportation industry is free to challenge generally applicable FHWA regulations in private litigation. In particular, our concern is that allowing such a challenge would effectively permit a regulated entity to circumvent the specific scheme for judicial review of FHWA regulations that Congress carefully established in the Administrative Orders Review Act (commonly known as

⁸ The dissent asserts that the waiver program is not part of the regulatory scheme. That is not correct. The statute governing the DOT safety standards specifically includes a provision allowing for waivers of the regular standards and we consider the "scheme" to include all the relevant rules, regulations, and statutory provisions.

the Hobbs Act).⁹ 28 U.S.C. §§ 2321, 2342. Because the parties have not addressed this question, however, we will not decide it here, leaving it to the district court to do so initially, should further proceedings following remand make such a determination appropriate or necessary.

[13] In any event, Albertson's has simply failed to produce any evidence that Kirkingburg and other waiver recipients pose a direct safety threat. Under the statute, a direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at § 12111(3). A "significant risk" means a high probability of harm that is neither remote nor speculative. 29 C.F.R. § 1630.2(j). Drivers who qualify for the waiver program have necessarily established to the satisfaction of the agency charged with ensuring highway safety that they do not pose a safety threat at all.¹⁰ Denying a monocular-

9 The Hobbs Act governs judicial review of rules, regulations, and final orders of a handful of agencies, including the Interstate Commerce Commission, under which authority the FHWA acts. For a discussion of the Hobbs Act and its purposes, see *Carpenter v. Department of Transportation*, 13 F.3d 313 (9th Cir. 1994). *Carpenter*, a pre-waiver program case, involved a driver with monocular vision who had been disqualified from driving when the FHWA found that he did not meet the applicable vision standards. The driver brought an action in federal district court, claiming that the regulations violated his civil rights. We dismissed the claim, finding that the Hobbs Act "requires that such a challenge be brought only in the court of appeals." *Id.* at 314.

10 It bears mentioning once again that, prior to offering Kirkingburg a job, Albertson's gave him a 16-mile road test. He performed well on the test and demonstrated to Albertson's transportation manager that he had "superior driving skill to operate safely the type of

visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of unwarranted discrimination that the ADA sought to abolish.

[14] To the extent that Albertson's contends that DOT vision requirements governing the qualifications of truck drivers constitute a floor, not a ceiling, and that it is free to adopt more restrictive standards than are set forth in the regulations, it misperceives the nature and purpose of the FHWA waiver program. The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA and serves to protect disabled persons against unfounded discrimination. More important for our purposes, however, the individuals who secure waivers under the program have been determined to be safe drivers. It is evident, therefore, that however one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability.¹¹

commercial vehicles listed above." In fact, the record as a whole demonstrates clearly, and without a hint of any contrary evidence (other than the fact of his monocular vision), that Kirkingburg is eminently qualified for the job of commercial truck driver.

[15] Albertson's does not contend that it is entitled to adopt vision standards that are more stringent than those contained in the federal regulations, including the waiver program, because the work its drivers perform is substantially different from the work performed by other commercial truck driver. We express no view as to how such an

Albertson's may, in other respects, be able to adhere to stricter standards than those contained in federal regulations. But when the stricter standards it adopts screen out people with disabilities in contravention of a federal program designed both to protect the public safety and ensure compliance with the ADA, it will not be able to avoid the Act's strictures by showing that its standards are necessary to prevent a direct safety threat. To put it another way, the FHWA has already determined that the regular DOT vision standards, if applied across the board, would unnecessarily discriminate against visually impaired drivers in violation of the ADA. It has also determined that some visually impaired drivers who cannot meet the regular standards are nevertheless safe, competent drivers. In light of the agency's determination that waiver recipients do not pose a threat to public safety, we conclude that Albertson's is precluded from asserting that they do.

CONCLUSION

In short, we conclude that if the facts are as Kirkingburg alleges, he suffers from a disability and is therefore protected by the provisions of the ADA. We further conclude that in establishing its job-related prerequisites, Albertson's cannot selectively adopt and reject federal safety regulations when the effect of its selective adoption and rejection is to discriminate against truck drivers with disabilities. Albertson's job requirement, which screens out otherwise qualified

argument would fare in a case in which it was properly presented.

individuals with disabilities, is invalid.

Because Kirkingburg's failure to satisfy the discriminatory prerequisite served as the sole basis for the granting of summary judgment in favor of Albertson's, we reverse the district court's award and remand for further proceedings.

REVERSED and REMANDED.

RYMER, Circuit Judge, dissenting:

The majority subjects Albertson's to liability under the ADA for requiring a commercial truck driver to comply with the visual acuity regulations of the Department of Transportation as an essential function of his job rather than letting him participate in an experimental program that waived those requirements but had not been found safe. I must dissent.

Complying with current DOT safety requirements was an essential function of Kirkingburg's job at Albertson's.¹² There is no dispute that his eyesight didn't meet them. He could not be certified. But several

12 Kirkingburg contends that the essential function of his job was being certified by DOT, not being in compliance with its regulations. However, there is no evidence that Albertson's ever accepted a waiver or defined the essential function of driving its commercial vehicles as anything less than complying with DOT visual acuity standards.

months before he lost his certification, the FHWA decided to select a group of experienced monocular drivers with clean safety records to be licensed for a three year study of the relationship between visual disorders and commercial motor vehicle safety. Kirkingburg says that he could have performed the essential functions of his job by virtue of a waiver, and that in any event, his disability should have been accommodated by allowing him a leave of absence to get one.

The problem is that DOT vision regulations were adopted for public safety. The version in effect in November 1992, when Kirkingburg failed to get certified, had been on the books since 1970. Although numerous studies had been conducted to determine whether vision requirements for monocular drivers could safely be changed, the FHWA found no sufficient basis for doing so as recently as July 16, 1992.¹³ See 57 Fed. Reg. 31458 (1992). That's why the FHWA decided to conduct a study to gather empirical data on monocular drivers, and to grant waivers on a limited basis to an experimental group. See id. Even so, the FHWA had not determined that the existing regulations could safely be waived albeit experimentally for monocular drivers. That is why the D.C. Circuit held that the waiver program itself was invalid; the agency had not made the required finding that a waiver was "consistent with the safe operation of commercial motor vehicles" as required by statute.

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13 See *Rauenhorst v. Department of Transp.*, 95 F.3d 715 (8th Cir. 1996) (outlining history).

Highway Admin., 28 F.3d 1288, 1289 (D.C. Cir. 1994).

Neither Kirkingburg nor the majority explains why the ADA should force Albertson's to assume the risk of waiving vision requirements that the FHWA itself had not found could be safely waived. Instead, the majority says that because the FHWA determined in 1994 that the vision study was safe enough to continue, Albertson's cannot say that in 1992 its requirement of complying with the vision regulations and rejecting a waiver was justified on account of safety. But the syllogism is flawed:

1. The majority starts with the premise that the dispositive question is "whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied." Whatever this means in the context of the ADA (where the real question is whether the employee is a "qualified individual with a disability who, with or without accommodation, can perform the essential functions of the employment position," 42 U.S.C. § 12111(8)), it cannot be the case that requiring compliance with DOT safety regulations is unlawful. Nor can it become unlawful "as applied" when the alternative is a waiver available only to an experimental group of drivers in a study that no one had found was consistent with the safe operation of commercial motor vehicles.

2. Next, the majority asserts that Albertson's has not "simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program." However, Albertson's did not pick and choose regulations: the regulations hadn't changed in November

of 1992 (and still haven't). It conformed its conduct precisely to the regulations in effect. The vision study waiver program was not part of the regulations, nor was it "a portion of the federal scheme" to prevent discrimination that Albertson's impermissibly rejected, as the majority suggests. Rather, the vision study waiver program was part of the FHWA's "efforts to review, and to eventually amend, its vision requirements through a rulemaking action." 57 Fed. Reg. 31458, 31458 (1992). As the agency explained,

the waiver program will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of CMVs. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology.

Id. In short, the vision waiver study was not a rule or a regulation with the force of law. It was a test, and an invalid test at that (as the D.C. Circuit held), for no determination had been made that waiving the vision requirements would not adversely affect the safe operation of commercial vehicles.

3. Next, the majority says that the waiver program "has been adjudged a success by the FHWA." Whether that's so or not, the determination referred to is the FHWA's "Notice of Final Determination and change in research plan" issued November 17, 1994 -- two years after Kirkingburg lost his job. 59 Fed. Reg. 59386, 59389 (1994). But it doesn't matter what the FHWA *now* thinks about the safety of its waiver study program. Whatever it had learned as a result of two years worth of the experiment wasn't known to Albertson's in November 1992, or to the agency at the time of the study was begun in July 1992. As Kirkingburg seeks damages for his November 1992 termination, not reinstatement, the 1994, post-*Advocates* determination is simply irrelevant.

4. Finally, having said that Albertson's adhered to only part of the regulations because it ignored the waiver program, and that the waiver program is a success, the majority concludes that the waiver program "is a lawful and legitimate part of the DOT regulatory scheme" which Albertson's cannot say was not safe. Thus it holds that Albertson's "cannot selectively adopt and reject federal safety regulations" in establishing its job-related prerequisites, and that its job requirement is invalid. But since the vision study waiver program never was (and still isn't) a part of the regulations; and since it wasn't a success at the time of Kirkingburg's termination because it hadn't gotten off the ground and wasn't determined to be safe; and since it never was (and still isn't) a part of any regulatory scheme, there is no basis for holding that Albertson's job requirement is invalid. Nor is there any authority for estopping Albertson's, which is a private employer with legal responsibility to the public for the

safety of its commercial motor vehicle drivers, from asserting that it wasn't required to accept a waiver, or that it wasn't reasonable for it to decline to do so, on the grounds of safety. To me it is dispositive that at the time of Kirkingburg's termination (and in this record), no one (including the FHWA) had determined that a waiver was safe.

For these reasons, I agree with the district court that Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements, and that the ADA does not require Albertson's to accept an experimental waiver that the FHWA had not found consistent with the safe operation of commercial motor vehicles. Since Albertson's offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected), it fulfilled its ADA obligations. I would, therefore, affirm.

(Caption omitted in printing)

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT OF COUNSEL

Albertsons, Inc. ("Albertsons"), appellee in Hallie Kirkingburg v. Albertson's, Inc., No. 96-35002, seeks rehearing *en banc* of the May 11, 1998 2-1 split decision (Reinhardt, S., Goodwin, A.) (Rymer, P -- Dissent) concerning an issue of national significance under Department of Transportation ("DOT") regulations, 49 C.F.R § 391.41(b)(10), and the American with Disabilities Act ("ADA"), 42 U.S.C § 12112(a)(1994). The majority held that (1) Appellant, Hallie Kirkingburg ("Kirkingburg"), was "disabled" within the definition of the ADA; (2) Kirkingburg has raised a genuine issue of material fact with respect to whether he is a "qualified individual" under the ADA; (3) Albertsons had a duty to accept vision waivers issued under the Federal Highway Administration's ("FHWA") program; and (4) Albertsons failed to demonstrate that waiver recipients pose a direct safety threat.

Albertsons respectfully seeks rehearing *en banc* of all issues above. In the judgment of Albertsons' counsel, rehearing *en banc* is required because the Opinion of the Majority overlooked long-standing, well-established Federal Regulations in favor of an experimental program that was not an official part of Federal law, and relied on facts that were not a part of the record below. Additionally, the Opinion involves principles of law that currently have resulted in split-circuit decisions. The issues raised herein are of exceptional importance. The Majority's Opinion, if allowed to stand, will affect the health and safety of the general public. Further, the Majority's Opinion contravenes the vision requirements of the Federal Regulations that have been unchanged since 1970. See, 49 CFR §391.41(b)(10).

II. PETITION FOR REHEARING EN BANC

A. The Majority's Opinion Nullifies the Vision Requirements of the DOT.

- 1. Contrary to the Majority's Opinion, an employer has no duty to accept vision waivers issued under the FHWA's program.**

The Majority held that Albertsons had a duty to accept Kirkingburg's FHWA vision waiver, stating that Albertsons "has chosen to adhere to only a part of the [DOT] regulations, while ignoring the waiver program." Slip op. at 4618. The Majority further stated that Albertsons "cannot selectively adopt and reject federal safety regulations." Slip op. at 4626.

The majority confuses the issue. The vision waiver program was not a part of the regulations in 1992, when Albertsons made the decision to adhere to the regulations, nor has it ever been a part of the regulations. To the contrary, "[t]he vision study waiver program was a part of the FHWA's 'efforts to review, and eventually amend its vision requirements through a rulemaking action.'" Slip op. at 4628, citing, 57 Fed. Reg. 31,458 (1992). The agency, itself, defined the vision waiver program as a "study" to provide it with necessary "empirical data." Id. It was not an official rule or regulation, it was solely an experiment. Significantly, this experiment has never been found to be successful enough to warrant amending the actual regulations. The Majority's holding that the FHWA vision waiver program is a part of the DOT Regulations is in error, and this should be revisited en banc.

- 2. The Majority's Opinion is contrary to the intent of long-established Federal Regulations.**

The vision requirements in effect in November 1992

(when Kirkingburg was examined by the physician who informed Albertsons that Kirkingburg did not meet the minimum standards) had been unchanged since 1970 (and are, at the present time, still unchanged).

The minimum vision requirements established by DOT for operators of commercial motor vehicles require:

"distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 C.F.R. §391.41(b)(10).

Forcing Albertsons to accept Kirkingburg's vision waiver would be contradictory to the long-established, and only official, DOT vision requirements. As stated above, the regulations containing these requirements have never been changed.

B. The Majority Relies on Facts That Are Not in the Record and on Case Law Which Has Only Split-Circuit Endorsement, to Establish That Kirkingburg Is "Disabled."

- 1. The facts relied on by the Majority are not in the record.**

The Majority held that Kirkingburg has presented a genuine issue of material fact regarding whether or not he was "disabled" under the meaning of the ADA, relying, on part, on information that was not in the record. The ADA provides coverage for a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1994). The ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of**

such individual;
(B) a record of such an impairment;
(C) or being regarded as having such an impairment.

42 U.S.C. § 12102(2). (emphasis added). The Majority looked to the implementing regulations to assist in defining “disability” and appeared to rely heavily on the language that states (in relevant part) that “an impairment is substantially limiting if it ‘significantly restricts as to the ... *manner* ... under which an individual can perform a major life activity ... as compared to the ... *manner* under which the average person in the general population can perform that same major life activity.’” Slip op. at 4613, citing, 29 C.F.R. § 1630.2(j)(1)(ii) (1993).¹

The Majority, after stating that “Kirkingburg is substantially limited in the major life activity of seeing,” goes on to explain that Kirkingburg’s “brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner*, in which he sees differs significantly from the *manner* in which most people see.” Slip op. at 4614 (emphasis original). However, significantly, this information, upon which the Majority relies for the determination that Kirkingburg is “disabled,” is simply not in the record. Thus, Albertsons urges an en banc rehearing to determine whether Kirkingburg is “disabled” under the ADA, relying only on the record before it.

2. The Majority relies on a principle of law which currently involves split-circuit decisions.

¹ This Court is bound by statutes, not regulations, this Court has recognized in the past that regulations provide guidance, but are not binding.

In determining that Kirkingburg’s monocular vision was a “disability” under the ADA, the Majority relied on an Eighth Circuit opinion, Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997). Doane held that a monocular-visioned person was “disabled” because “the *manner* in which he performed the major life activity of seeing was different.” Slip op. at 4615, citing, Doane at 627. However, The Majority, in a footnote, cited to a Fifth Circuit decision that directly contradicted the Doane case by holding “as a matter of law, that a monocular-visioned individual was not disabled because he was ‘able to perform normal daily activities.’” Slip op. at 4615 (emphasis added), fn. 4, citing, Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997). Until the Majority’s Opinion in the instant case, the Ninth Circuit had not decided this issue. As this issue has resulted in split- circuit decisions, it must evaluated carefully and not relegated to a mere footnote. This issue, alone, deserves en banc rehearing.

C. The Majority’s Finding that Albertsons’ Policy of Requiring its Drivers to Meet the Minimum DOT Vision Standards is Unlawful “as Applied” is Fatally Flawed.

1. Meeting the minimum requirements of the DOT Regulations is an essential function of Albertsons’ drivers of its commercial vehicles.

In order for employees to enjoy the protection of the ADA, they must not only demonstrate that they meet the definition of “disabled” but must also establish that they are “qualified individuals” under the statute. See, Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990). The factors considered in determining whether an individual is “qualified” are: 1) whether a person satisfies the requisite skill, experience, education and other job-related requirements of the employment position, and 2) whether with or without

reasonable accommodation the individual can perform the essential functions of the position. See, 29 C.F.R. § 1630.2(m).

The Majority held that Kirkingburg had established a genuine issue of material fact with respect to his status as a "qualified" individual. Although Albertsons contended that Kirkingburg failed to meet the "essential function" prong of the "qualified individual" test by the fact that he did not meet the minimum requirements of the DOT, the Majority addressed this issue under the "job-related requirement." Albertsons respectfully asserts that the proper analysis would be under both prongs.

"Essential functions" are defined by the regulations as "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n). In order to work as a commercial driver for Albertsons, an individual must meet or exceed the standards set out in the DOT Regulations. Albertsons does not allow drivers to drive its commercial vehicles without meeting or exceeding the standards set out in the DOT Regulations. Kirkingburg did not meet the minimum DOT standards, thus he could not drive commercial vehicles for Albertsons. Driving is a "fundamental job duty" of Albertsons' position of commercial truck driver. Contrary to the Majority's holding, because he did not meet the DOT minimum standards, Kirkingburg could not perform the essential function of a commercial truck driver for Albertsons.

Second, the Majority did not ultimately address whether Kirkingburg met the "job-related requirement." Rather, the Majority attacked the legality of Albertsons' enforcement of the job-related requirement that commercial vehicle drivers meet the minimum standards of the DOT Safety Regulations "as applied." Slip op. at 4617. The Majority, again, relies on its misplaced understanding of the FHWA's vision waiver program and that program's relationship with the Federal Regulations. As stated above (Section A, 1., 2.), the waiver program of the FHWA was never a part of the Federal

Regulations, rather it was an experimental program. A rehearing en banc is strongly suggested to resolve the relationship between the waiver program and Federal Regulations.

Additionally, the Majority disputes Albertsons' argument that it was concerned with the safety of the vision waiver program. The Majority does not provide any support for its assertion that Albertsons' decision not to accept vision-waivers was not based on safety. The only support cited by the Majority is a 1994 FHWA Notice, 59 Fed. Reg. 59,386, 59,389, which announced that the waiver program "has been adjudged a success by the FHWA." Slip op. at 4619. Thus, the Majority relies on a Notice that was issued two years after Mr. Kirkingburg left the employment of Albertsons. It is clearly not a Notice of which Albertsons would have been aware in deciding the safety issues involved in accepting a vision waiver (Although, that decision never had to be made, as Kirkingburg did not have a valid waiver at the time of his termination.).² Again, because the Majority relied on facts outside the record and because the safety at issue here involves not only the safety of the drivers, but also the safety of the general public, Albertsons urges rehearing en banc.

² Significantly, Kirkingburg did not have a vision-waiver at the time of his termination. See, Appellant's Opening Brief, 5-6, 10. He did not receive a vision-waiver until 3 months after his termination. See, Id. Therefore, even if the Court follows the Majority's reasoning that Albertsons had to apply both the DOT Regulations and the FHWA's vision-waiver, and not pick and choose which to follow, Kirkingburg still would not escape his termination. At the time of his termination, Kirkingburg had not satisfied either the DOT vision requirements contained in the Federal Regulations, or the requirements of the FHWA vision waiver. The facts at issue here are inconsistent with the result reached by the Majority's Opinion.

III. CONCLUSION

For the foregoing reasons, Albertsons respectfully requests rehearing of all issues presented above, and/or rehearing en banc, as appropriate, for reasons set out in the statement of counsel, above.

DATED this 23rd day of May, 1998.

CORBETT GORDON & ASSOCIATES, P.C.

s/ Heidi Guettler

Corbett Gordon, OSB No. 82009

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Albertsons, Inc.

(Certificate of Service omitted in printing)

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HALLIE KIRKINGBURG,	)	No. 96-35002
)	
Plaintiff-Appellant,	)	D.C. No.95-549-PA
v.)	
	)	ORDER
ALBERTSON'S, INC.,	)	Filed July 8, 1998
)	
Defendant-Appellee.)	
)	

Before: GOODWIN, REINHARDT, and RYMER,
Circuit Judges.

Judges Goodwin and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

EXCERPTS FROM DEPOSITIONS

DEPOSITION OF DAVID MICHAEL COOPER

DIRECT EXAMINATION

By Mr. Busse:

[79ER] Q. Where do you work?

A. Albertson's distribution center.

Q. What do you do there?

A. I'm currently transportation superintendent.

Q. And who do you report to?

A. Ted Sturgill.

Q. Who reports to you directly?

A. Who reports to me directly?

Q. Right, right.

A. I oversee the dispatch office, so --

Q. Have you had any dispatching positions open there in the last couple of years?

A. I would say yes.

Q. You know Hallie was terminated in November of '92. When was the next dispatching position, to your recollection, that came available after that?

A. Gosh, sometime in '93, I would guess.

Q. How many dispatchers do you have?

A. Four. And one -- and one safety, so actually -- he's a dispatcher, also.

Q. Okay, so we've got five. Is it ..? per shift? Or how do you cover it?

A. One per shift.

[80ER] Q. You mean Hallie.

A. Right.

Q. If he would have wanted it, would you have given him a good recommendation?

A. I would have to know about his background.

Q. Do you hire people that have no dispatching background, per se, I mean, who are drivers?

A. I'm not involved in the hiring of dispatchers at all.

Q. I understand. But from your knowledge, do you have some dispatchers that have never dispatched before; they've driven before?

A. I had never dispatched before, so --

Q. Were you ever a dispatcher?

A. No. I was a driver, before I came into dispatch.

Q. What was your first job in dispatch?

A. A dispatcher.

Q. Okay. For how long were you a dispatcher?

A. Four years, five years.

Q. And then your next job was?

A. Superintendent.

DEPOSITION OF ROY DWIGGINS

DIRECT EXAMINATION

By Ms. Gordon:

[88SER] Q. And in connection with his union grievance, did Albertson's make any offers of alternate jobs to Mr. Kirkingburg other than over-the-road driving?

A. Yes.

Q. Do you remember that they made an offer of a yard hostler job?

A. Yeah, they did.

Q. And do you remember that they made an offer of a tire man job?

A. Yes.

Q. Were you the person who was in contact with Mr. Kirkingburg about those offers?

[89SER] A. Yes, I was.

Q. And did Mr. Kirkingburg refuse both of those jobs?

MR. BUSSE: Objection, leading.

Q. Did you offer him each of those jobs?

A. I remember distinctly offering him the tire job, and I know I have a letter from the company offering him the yard job.

Q. Do you remember whether he accepted or rejected those positions?

MR. BUSSE: Objection, compound.

Q. Can you answer that question?

A. I remember that he didn't take the tire job, and I don't really know for sure if we got into the hostler job a whole lot at that time.

Q. Do you remember telling him that the company had offered him the yard hostler job?

A. Yes.

Q. And do you remember him telling you anything about whether he did or did not want that job?

A. The only thing -- I looked through my file. The only thing I can recollect is, within a couple of days after receiving that, we asked for arbitration on the issue. I don't recall a specific

DEPOSITION OF HALLIE KIRKINGBURG

DIRECT EXAMINATION

By Ms. Gordon:

[26ER] Q. Now, do you remember being offered a job to work in the mechanic shop?

A. No, I don't remember being offered any job in the mechanic shop.

Q. Do you remember the union telling you about one or two positions that were available, Roy Dwiggins or somebody from the union talking to you about that?

A. I remember something about a yard -- deliver tractors in the yard and moving trailers.

[27ER] Q. Is that a yard hostler job?

A. I'm not sure that's the right terminology.

Q. And is that a job you wanted?

A. I gradually accepted. I thought I had it.

Q. Did you understand why you didn't get that job?

A. I was never informed of any reason.

Q. After that do you remember being offered a job that had to do with going into the mechanic shop?

A. I was never offered a job, that I know of, in a mechanic shop.

Q. What about being a tire man in the shop?

A. There was that kind of an offer made to me.

Q. So when you say no job was offered, I wasn't offered any work, that's not absolutely correct, is it?

MR. BUSSE: Objection, argumentative. You can answer.

THE WITNESS: Was that a question?

MR. BUSSE: Yes.

THE WITNESS: I didn't understand it then.

* * *

[28ER] Q. Okay. How old are you?

* * *

[28ER] A. 57.

Q. What's your date of birth?

A. May 21.

Q. What year?

A. Oh, '38.

Q. May 21, 1938?

A. Correct.

[29ER] Q. And outside of the Air Force have you had any formal education, classroom education?

A. Yes.

Q. What was that?

A. I went to Cerritos College.

Q. Can you spell that?

A. No.

Q. Cerritos College?

A. (Nodding head).

Q. Where is Cerritos College?

A. Norwalk, California.

Q. Did you graduate from Cerritos College?

A. Yes.

Q. With what degree?

A. The one that says A's, AA or something.

Q. Associate of Arts?

A. Yeah.

Q. Okay. What year?

A. Well, I got the diploma in '79.

* * *

[30ER] Q. In the Air Force what kind of training would you receive?

A. Jet aircraft mechanic.

Q. Anything else?

A. Not that I can think of.

Q. When you took the mechanic training when you worked for Los Angeles County and you took automotive classes from different dealerships, was that basically automobile mechanics?

A. And trucks.

* * *

[35ER] Q. All right. And then is it your testimony that you didn't have another workers' comp injuries until you came to work at Albertson's?

A. That's right.

Q. What was your next workers' comp injury?

A. I think something fell on my back at one time.

* * *

[36ER] A. I was hurt in '91.

Q. Okay. What happened in '91?

A. I don't know what happened. I hurt my head, I know that.

* * *

[36ER] Q. And the injury at Albertson's where something fell on your back?

A. Sometime in '90.

Q. The Albertson's injury where you were lifting a dolly and hurt your shoulder?

A. Seems to me like it was in '92 but -- 1990, I mean.

Q. 1990 also, okay. And the injury where you were in

Washington and slipped on some ice and hit your head on a dolly, do you remember the year for that?

A. No. It was after '90, but I don't remember.

Q. It was after '90 and before this 1991 injury; is that right?

A. Yes.

[37ER] Q. Now, let's talk about the injury in 1991. You say you don't remember what happened. What's your understanding of what happened?

A. I fell from a truck.

Q. Do you know what caused you to fall?

A. No.

Q. And is it your understanding that you injured your head in that fall; is that correct?

A. That's correct.

Q. Was that accepted as a workers' comp injury?

A. I don't know.

Q. Did you get your doctor bills paid?

A. Most of them.

Q. Okay. Was it just your head that was injured in this 1991 injury or were there any other parts of your body that were injured as well?

A. I know my hand and my shoulder hurt.

Q. And are you aware of the workers' comp carrier accepting parts of that as a workers' comp injury and not another part? In other words, were some of your body parts covered and others not, in your understanding?

A. My understanding is I don't know all about it.

[2SER] A. No. Same thing, I believe 20/20. Well, you said left, but I don't know. My left eye doesn't change with the glasses.

[38ER] Q. When did you begin wearing glasses?

A. Must be when I was 12 or 13 years old.

[38ER] Q. Did this eye condition keep you from any particular assignments when you were in the Air Force that you're aware of?

A. No.

Q. Other than your experience at Albertson's, has your eye situation ever interfered with your doing anything else in terms of work that you wanted to do?

A. Not that I recall.

Q. Have you avoided doing any types of work because of your eye condition?

A. Not that I recall.

Q. And are you aware of anything that you have

[39ER] Q. And insofar as there are factual statements in here, do you believe those to be true?

A. I'm not clear on what you mean by factual statements.

Q. Okay. Let's start, for instance, with Statement of Claims, Claim One, ADA, paragraph 6 on page 2. There's a factual statement here that says "Plaintiff" - that's with reference to you - "was employed by defendant" - that's with reference to Albertson's - "as a truck driver until November 20, 1992 when he was terminated." Do you believe that to be a true statement?

A. The best I can recall.

Q. When were you first employed by Albertson's?

A. Sometime in '90.

Q. And it's your understanding you were terminated November 20, 1992; is that correct?

A. Yes.

[40ER] Q. By whom?

A. The transportation manager he called himself.

Q. Do you remember his name?

A. I think it was Sturgess or Sturgill.

Q. Ted Sturgill?

A. Ted Sturgill.

Q. At the time that you were terminated by Ted Sturgill, did Mr. Sturgill give you any reason?

A. His reason was, "We're not going to accept the waiver."

Q. Did you have a waiver at that time?

A. No.

* * *

[41ER] right name is. That my vision had not changed and wasn't likely to change.

Q. Do you remember when you heard back from the DOT about your waiver application?

A. It was in February of '93.

Q. And at the time that the waiver -- I take it you were granted a waiver; is that right?

A. It took a long -- longer than necessary to get the waiver, yes, but I did get the waiver.

Q. When did you actually get the waiver?

A. The end of February 1993.

Q. When you got that waiver what, if anything, did you do with it?

A. I took it, I believe I took it over to the transportation people, or maybe called them. I don't know which one.

Q. You don't have a specific recollection?

A. Maybe both. Maybe I sent it, maybe I took it over. I don't know.

Q. Do you remember with whom you spoke, whether it was in person or on the telephone?

A. No, I don't.

Q. Do you remember what the person told you, whoever it was?

A. No.

* * *

[42ER] Q. What's the first job you are aware of that came open after November 20, 1992 that did not require DOT vision certification?

A. That's an awful long question. I can't remember what you said.

Q. Okay. At some point after November 20, 1992 did you become aware of an opening at Albertson's, a nondriving opening?

A. I believe the first one was this trailer -- trailer moving.

Q. Okay. Did somebody offer you the trailer moving job?

A. I believe the union man called me and told me to call Albertson's, they had that opening.

Q. Did you call Albertson's?

A. Yes.

Q. Who did you talk to?

A. I believe I was told to call somebody by the name of Frank.

Q. Is that Frank Riddle?

A. He's a -- he's, I believe, in charge of that center.

Q. Okay. Frank Riddle, the general manager?

[43ER] A. I'm not sure what his title is, but he was the one I was told to get a hold of.

Q. And did you get a hold of Frank?

A. Yes.

Q. And what do you recall of that conversation?

A. He actually didn't know anything about it. He told me he has to catch up on it.

Q. Catch up on the opening or catch up on you or catch up on what?

A. He wasn't aware of the opening or aware of what was going on, more than likely.

Q. Did Frank catch up on whatever and call you back?

A. He says, "I'll have Ted call you back."

Q. Did Ted call you back?

A. Correct.

Q. And that's Ted Sturgill?

A. Yes.

Q. Do you remember that conversation?

A. I don't remember the conversation, other than I believe I was supposed to go over to the center.

Q. To the Portland Distribution Center?

A. Correct.

Q. Did you go over to the center?

[44ER] A. Yes.

Q. What did you do when you got there?

A. I was told to be there at eight, whatever day it was. I'm not sure what day it was. And I remember they kept me waiting for a long, long time, like an hour or more.

Q. Do you remember who you were supposed to meet with?

A. Ted.

Q. Anybody else?

A. Not that I know of.

Q. Okay. Did you finally meet with Ted after waiting for over an hour?

A. Yes.

Q. In his office?

A. Yes.

Q. Anybody else present?

A. No.

Q. What do you remember of that conversation?

A. I know he was very rude to me.

Q. What do you remember of the conversation?

A. He asked me about -- if I had a DOT card.

Q. Uh-huh (affirmative response). Did you?

A. Yes.

Q. So was this after you had gotten your waiver?

[45ER] A. Yes.

Q. Okay. Then what? Did you show him the card?

A. Yes.

Q. Then what happened?

A. He asked me who that doctor was.

Q. And this is the doctor from the Tillamook Vision Center?

A. No. That's the Dr. Sayler that had given me the physical in October of 1992.

Q. So you had a physical before you were terminated?

A. I had a physical before I was released to go to work by Albertson's doctors.

Q. Okay. What else do you remember of the conversation?

A. He gave me some papers to read.

Q. What were they?

A. How to hook up trailers.

Q. What else happened?

A. And then he sent me back to the lunchroom to read the papers.

Q. Then what happened?

A. A man, I believe his name is Dave, that is now -- when I was driving he was a dispatcher. Now [46ER] I believe he is promoted.

Q. Is that Dave Cooper?

A. I'm not sure of his last name. I'm only pretty sure of his first name.

Q. Oh, okay. A man named Dave did what?

A. He came to the lunchroom and got me; we went back to the office.

Q. Then what happened?

A. As near as I recall, he said "Ted said take these home and read them. We'll be calling you," and I can remember being about as happy as I could be.

Q. So did you take them and go home?
A. Yes.
Q. And then what happened?
A. I went home and they never called me.
Q. Do you know why?
A. No.
Q. Do you know if you need to have DOT certification to do the trailer job?
A. No.
Q. Are you aware of whether Albertson's needs to take a waiver, a vision waiver?
A. I'm not -- I don't understand your question.
Q. Do you know whether as an employer who employs over-the-road truck drivers or people who

[4SER] Q. What's the next contact you had with someone from Albertson's?
A. I believe personnel called me about a tire re -- repairing tires.
Q. Do you remember when that was?
A. No. After the trailer moving.
Q. After you'd gone in and talked to Ted and Dave about the trailer moving job?
A. Yes.
Q. Do you know whether there had been any other jobs opened at the Portland Distribution Center at Albertson's between the trailer moving job and the tire man job?
A. Yes.
Q. What openings were those?
A. Truck driver.
Q. Anything other than the truck driver?
A. Not that I'm aware of.
Q. Were those over-the-road truck driving openings?
A. Yes. I believe the ads are the same thing that I

answered prior to Albertson's.
Q. In other words, it was similar to the job [47ER] that you'd been doing for Albertson's?
A. That's correct.
Q. And it would require DOT certification?
A. Yes.
Q. Other than the truck driver jobs that were opened between the trailer moving job and the tire man job, are you aware of any other jobs at the Portland Distribution Center that came open during that time?
A. No.
Q. Okay. Tell me about the conversation when personnel called you about the tire repair job.
A. The best I can recall, he said there was an opening in the tire repair shop.
Q. Is this again Charlie Norris?
A. Yes.
Q. And do you remember what you responded?
A. Told him I'd never changed a truck tire in my life.
Q. You had never change a truck tire?
A. That's right.
Q. Were you interested in the job?
A. I was interested in work but I didn't feel I was qualified for that job.
Q. Did you tell Mr. Norris that?
[48ER] A. Not at that time.
Q. Why not?
A. The best I can recall the conversation was I asked him what it paid, and he said about eight or \$9 an hour. And that was, I believe, about five or six less than I'd been making an hour. I told him I didn't know anything about that. He said they would teach me, but he gave me -- he says, "We will. I'll let you call me back on the next Tuesday," I believe it was, or a Monday, and let him know.
Q. Did you call back?
A. No.

Q. Why not?

A. He called me before that, before I called back.

Q. Okay. What happened in that phone call?

A. I asked him, I said, "Charlie, would this job eventually get me back to driving truck?" And he said, "Hold on a minute," while he asked Ted. He come back on the phone and said, "No."

Q. Did you ask him why?

A. No is no.

Q. Did you ask him why?

A. No.

Q. And then at that point was there any more discussion about the tire man job, whether you wanted it or not?

A. I believe I told him under those conditions I wouldn't accept that job.

Q. Between the time that you were terminated in November of 1992 and the time that you refused the tire man job, had you been out looking for other work?

A. Yes.

Q. Had you actually worked for anybody during that period of time?

A. Yes.

Q. Who did you work for?

A. I drove for the people I used to drive for, the Pepsi people.

Q. Anybody else?

A. That's the only people I actually worked for.

Q. Now, the Pepsi people, is this from the Pepsi warehouse in Wilsonville?

A. No. This is Pestaga Trucking owns several Pepsi trucking companies in the area.

Q. Who? Can you repeat the name?

A. Pestaga.

Q. Can you spell that?

* * *

[50ER] Q. It says in the next paragraph "On December 3rd, 1991 Plaintiff sustained a compensable injury." Do you know what that means?

A. Yes.

Q. What does it mean?

A. I believe that I was hurt on the job.

Q. Okay. Is this the time that we've been talking about, you fell out of the truck in 1991?

A. Yes, I believe so.

Q. The next sentence says that "Following his release for full duty Defendant subjected him to a physical examination." Did you at some point have a release, a full release to return to work?

A. Yes.

Q. Do you remember when you got that?

A. On the 6th of November.

Q. Okay. And how did you come to have a physical examination?

[51ER] A. It was scheduled by Albertson's doctors.

Q. Okay. And somebody told you you needed to go do that?

A. Yes.

Q. Had that happened to you before when you were coming back from a workers' comp injury?

A. I'm -- I'm confused. When you said "physical examination," I thought you meant the release to go back to work.

Q. What this sentence says is "Following his release for full duty," Albertson's, the Defendant, "subjected him," that's you, "to a physical examination."

Is it your testimony then that it was before you got the full release you had the examination?

A. My testimony is, is one doctor released me to go to work unconditionally, and I took that release to Ted Sturgill and they would not accept it. They said I had to go get another physical examination.

Q. Okay. What doctor gave you the full release?
A. I'm not sure of his name, but it seemed like a color
like -- I want to say Brown, but I'm

* * *

[52ER] A. Pardon?

Q. Was it the same person who'd just gotten older or is it
a completely different person?

A. No, it was a brother to the first one, but a different
office, and that's what puzzled me about it.

Q. Do you remember that second examination?

A. Yes.

Q. Was there anything unusual about it?

A. Yes.

Q. What was it?

A. I felt that I was being inducted in the Air Force.

Q. What do you mean?

A. Very thorough examination.

Q. Did you have a problem with that?

A. It was unusual.

Q. Unusual compared with what?

A. Any other driver physical that I had taken before for
Albertson's.

Q. Did you ask Dr. Eubanks why he was being so
thorough?

A. No.

Q. Did you ask anybody why he was being so thorough?

[53ER] A. No.

Q. What's your understanding of the results of that exam?

A. The results was that they said I needed a vision
waiver.

Q. Dr. Eubanks told you that?

A. I don't remember if it was him or one of his nurses.

Q. Is that the first time you'd ever heard of a vision
waiver?

A. Yes.

Q. Did the nurse explain or Dr. Eubanks explain why you
needed a vision waiver?

A. They said something was wrong.

Q. Did you ask what?

A. Yes.

Q. What did they say?

A. Something's wrong with my vision.

Q. Did you ask for any more detail than that?

A. I said what? My vision has always been this. It has
never changed. So it was hard for me to believe what they
were talking about.

* * *

[54ER] Q. And then the third one says "Defendant" - that
would be Albertson's - "failed and refused to reasonably
accommodate Plaintiff by reassigning Plaintiff to other
suitable work."

Albertson's did offer you a tire man job that would not
have transfer rights; is that right?

A. Yes.

Q. And you do not consider that to be a reasonable
accommodation; is that right?

A. No. I felt that being a 56-year-old man, at that
particular time if I would have went in off the street and asked
for that job, there was no way in hell they would have ever
gave it to me, because in the paper it said the requirements of
that.

Q. What were the requirements in the paper?

A. I think about three years or longer experience and
something about inventory, but I don't remember all of it. But
what was so ironic

* * *

[58ER] Q. Why did you leave that job with LA County?

A. I decided I wanted to drive a truck.

Q. Do you remember why you made that decision?

A. Well, I'd been driving for the county on and off, road test.

[59ER] Q. Did you have a commercial license?

A. I had to have to work there.

[59ER] Q. Do you remember why you left? You went to drive a truck you said?

[60ER] A. Yes.

Q. Did you have a specific job you were going to?

A. I think moving van lines, something.

Q. Do you remember the name of the van line company?

A. I believe it was Global.

Q. Where was that based?

A. Anaheim.

[60ER] Q. (By Ms. Gordon) How long did you work for Global?

A. Maybe nine months to a year.

[61ER] Q. Why did you leave the Global van line job?

A. To go independent.

Q. Did you have your own truck?

A. Yes.

Q. Were you using your own truck on the Global job?

A. Yes.

Q. What kind of truck was it?

A. Kenwood.

Q. When you went independent, did you have contract work with people?

A. Well, I got my own authority in California.

Q. Is that the equivalent of the PUC authority?

A. I don't know.

Q. Was your authority just for in state or did you have intrastate authority?

A. It was only for California at that time.

Q. And your authority was for one truck?

A. Yeah.

Q. Okay. How long did you work as an [62ER] independent truck driver?

A. I'm not sure. Maybe '80 or '81.

Q. Do you remember any of the companies you drove for?

A. Yes.

Q. What were they?

A. Shane, Diamond Contract, W. Anaheim. There was a lot of other ones but I can't think of their names.

Q. Do you recall how well you did financially during the years you were an independent driver?

A. No.

Q. Why did you stop running your own truck in '80 or '81?

A. I believe it was divorce.

[64ER] Q. Okay. Tell me what happened with that gas station. You came up in '81 or '82 and took it [65ER] over, and what did you do with it?

A. Put the mini mart in it and sold it because I had bid on the county contract and got that.

Q. And is this the county contract where you were hauling garbage?

A. Yes.

Q. So is this -- you still had the same truck you had had in California?

A. No. I'd sold that one because it wouldn't work for the garbage.

Q. Okay. So you sold the over-the-road truck and you got a garbage truck; is that right?

A. Well, there's six months or so between one and the other, but yes.

Q. How long did you have the county garbage contract?

A. We had it till 1989.

* * *

[66ER] Q. Okay. And what was your next job after the garbage contract, your next regular job?

A. Well, I drove some for Pastega I believe.

Q. Could you spell that?

A. I'm not sure how to spell it.

Q. Is this the Pepsi contract?

A. Yes.

Q. Okay.

A. Tillamook.

Q. Using your own truck?

A. No.

Q. Using their truck?

A. Yes.

Q. Do you remember when you started that job?

A. No.

* * *

[69ER] Q. Okay, thanks. And you don't have to apologize for putting your hand on your head. You can do whatever makes you comfortable.

Okay. So you went and worked more and more for Denny during the summer of 1990 and then what happened?

A. He went to some independent haulers that did most of the hauling then.

Q. So your hours got cut?

A. Yes.

Q. Do you have any reason to think that he was dissatisfied with your work?

A. No.

Q. Okay. What job did you do next?

A. I applied for different jobs in the paper.

Q. Did you say in the paper?

A. In the newspaper.

Q. Okay. Do you remember what you applied for?

A. Yeah. Albertson's.

Q. Okay. Anything else?

A. I can't think of other ones now. Probably Safeway, maybe, ones that haul for Thriftway.

Q. And you were hired by Albertson's; is that right?

* * *

[70ER] A. M-hm.

Q. Do you have any understanding why those two amounts are set out separately?

A. Yeah.

Q. What is that?

A. One -- the first one is what they paid me compared to what I was making when I got hurt, and the second one is, as I understand it, the medical portion that they paid out.

Q. Okay.

MR. BUSSE: Oh. Excuse me.

Q. (By Ms. Gordon) Now, interrogatory No. 12 asked you for your driving record --

A. M-hm.

Q. -- and any driving restrictions, including personal as well as commercial over-the-road driving records. And your answer is "September 16, 1990, expired registration conviction

in Tillamook Municipal Court, personal?"

A. Uh-huh.

Q. What registration was that that expired?

A. I borrowed a -- an old U-Haul van from a friend of mine to move some stuff out of a rental I had, and come to find out, it wasn't legally registered.

[71ER] Q. Oh, so you happened to get stopped while you were in your friend's vehicle?

A. Yeah.

Q. And then interrogatory No. 13 asks you for your accident history, and you -- the response is "April 28, 1991, accident in Newberg, Oregon, personal, not at fault." What happened?

A. I was driving through Newberg on the way to work only because of the slide here on the Wilson River at that time

--

Q. I remember that.

A. -- and the other car was going down three lanes, and the car pulled over in front of me and forced me into the curb and the sign post.

Q. Were you injured in that accident?

A. Just I hurt my arm or shoulder, and I think it was just trying to grab whatever I had on the seat.

Q. There's -- answer to interrogatory No. 14 is your work history, and it includes a couple of things we haven't talked about yet so I want to make sure I have an understanding of your work history.

These are companies, as I understand it, for whom you actually have worked. Is that right?

A. Uh-huh.

* * *

[12SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 6, Mr. Kirkingburg. This lists your rate of pay as 13.25 as of February 9, 1992. Is that your recollection?

A. I don't -- I don't remember any of that, no.

Q. Okay. What's your best recollection of your rate of pay at the time you left Albertson's?

A. 14 something.

Q. Would that have been in 1991 or 1992?

A. I guess it would be '91, but I'm not sure.

* * *

[14SER] Q. Going on to Exhibit 9, the Employee Status Report records a termination date of 11-20-92 with a code of 418. And if you look on the back of this exhibit, 418 is checked and it says, "Other, employee failed DOT physical." Is that your [15SER] understanding of why your employment with Albertson's was terminated?

A. No, it's not.

Q. What is your understanding?

A. My -- I was only terminated after they told me they wouldn't accept the vision waiver.

Q. So this date is not correct?

A. This date -- I don't see a date on there, no. Oh, there it is. That's -- that's the day that Ted Sturgill called me at 4:30 in the afternoon.

Q. 4:30 in the afternoon Ted Sturgill called you on November 20, 1992?

A. That's right.

Q. And you had the conversation that you've already described on the record; is that right?

A. What conversation?

Q. The one that you talked about the first day of your deposition.

A. I don't remember that.

MR. BUSSE: Page 70.

MS. GORDON: You're good at this, Rich.

MR. BUSSE: Thank you.

Q. (By Ms. Gordon) "Question; at the time that you were terminated by Ted Sturgill, did Mr. Sturgill give you any reason?"

[16SER] "Answer; his reason was we're not going to accept the waiver."

A. That's right.

Q. And that happened on the 20th of November?

A. Yes.

Q. Okay. Had you then discussed a waiver with him at that time?

A. No.

Q. So do you know why he was talking to you about a waiver?

A. Well, because I applied for a waiver.

Q. Did you tell him you had applied for a waiver?

A. I don't know if I told him or not, but I know he was aware of it.

Q. Okay. I think you said before that you had talked to Charlie Norris about that.

A. I talked to Charlie right after I talked to Ted and found out he was listening on the telephone when Ted called me.

Q. Had you talked to Charlie before about the fact that you were applying for a waiver?

A. Not that I recall.

Q. Do you know how Ted Sturgill got the information that you were applying for a waiver?

[72ER] started, but I don't remember what his name was. You asked me for his address.

Q. Jeffrey Brown?

A. Brown, yeah. He released me to go to work with no restrictions at all. And they should have just put me back to work.

Q. Did Jeffrey Brown give you a DOT physical?

A. I don't know what you call it.

Q. You said you had a DOT card in your packet that said that you were okay. Is that right?

A. That's right.

Q. When was that card generated? When was the physical done for that card?

A. That was taken one week before I went to Dr. Brown.

Q. And it was after the accident?

A. Yes.

Q. Do you still have a copy of that card?

A. No. But Albertson's does.

Q. And what doctor did the physical for that card the week before?

A. I'm not sure of the doctor, but it was done at Tillamook medical where I always had all my physicals done.

Q. And as far as you know, that was a DOT [73ER] from Roy Dwiggins to Bruce Paolini dated November 30, 1992, requesting information regarding you and your reinstatement rights. Do you remember the union getting involved in this?

A. I remember -- I remember talking to this Dwigger -- Dwiggins.

Q. Okay. His letter says, "It is my understanding that Mr. Kirkingburg -" actually he wrote Kirkinburg "- has presented himself at the Portland center with a current, valid DOT card and has been refused work." Now, is that the card you were telling me about that the doctor issued about a week before Dr. Brown released you to return to work?

A. Yes.

Q. Do you have any understanding of why one doctor would find that you were fit for work under the DOT regulations and another would find that you were not?

A. You'll have to repeat that. I don't understand what you meant.

Q. Well, I'm just curious if you have any understanding how one doctor found that you were certifiable under the DOT regulations and another doctor found that you were not certifiable. Do you [74ER] know how that happened?

A. Well, there's three that I can think of. Albertson's Dr. Eubanks and the one that originally gave me the DOT, he

certified me. It was only after I got hurt that all of a sudden my vision was too bad to drive for Albertson's.

Q. So when you say there's three, you're talking about there's three different times that you were tested?

A. Three different Albertson's doctors -- no, two -- no, at least three or more plus my own doctor that gave me the clearance of the physical.

Q. And your own doctor who cleared you, do you remember who that was?

A. No, I don't remember the name, because lately - and by that, the last few years - you don't know who you're going to get when you go in for a physical.

Q. And that's the Tillamook center?

A. Yes.

[74ER] Q. (By Ms. Gordon) There's -- on Exhibit 2, page 2. He's kidding, you can go ahead and look at Exhibit 2. There's two Dr. Eubanks listed. There's [75ER] a Dr. Robert Eubanks in Troutdale and a Dr. Douglas Eubanks in Portland. Which Dr. Eubanks is it that was the Dr. Eubanks you're talking about when you say the Albertson's Dr. Eubanks?

A. The very first Dr. Eubanks I went to when they said I had to have a physical when they hired me was Dr. Bob Eubanks out in Troutdale.

Q. Okay. And then who's this other Dr. Eubanks?

[75ER] A. Well, there's actually more Dr. Eubanks. Dr. Bob Eubanks' wife also gave me physicals.

[75ER] Q. (By Ms. Gordon) So Dr. Bob Eubanks' wife

is also a Dr. Eubanks?

A. Yes.

Q. And then who is Dr. Douglas Eubanks?

A. He's the last Albertson's one that gave me a physical.

Q. So both Dr. Douglas Eubanks and Dr. Bob Eubanks are Albertson's Dr. Eubanks?

[19SER] Q. Okay. He found your vision in your left eye to be 20/200. Is that your understanding of the correct vision in your left eye?

A. Yeah.

Q. And he wrote, "Since birth." Do you know if he would have had any way of knowing that it had been that bad since birth other than your telling him that?

A. No.

Q. Did you tell him that, it had been that bad since birth?

A. I don't remember.

Q. Is it your belief that it has been that bad since birth?

A. Yeah.

[76ER] So is it your understanding, Mr. Kirkingburg, that you're driving on a waiver right now or you would be driving on a waiver or you would be driving on that card that you just took out of your pocket?

A. I'd have to have the waiver, too, when I drive, a copy of the waiver.

Q. And that will be a copy of the same thing we're looking at here which is the second two pages of Exhibit 27?

A. Yes.

Q. Okay. And you have an appropriate driver's license from Oregon?

A. Yes.

Q. And you have no suspensions or revocations on that driver's license?

A. No.

Q. And no reportable accidents in which a citation was issued to you for a moving traffic violation?

A. No.

Q. No convictions for a disqualifying offense or more than one conviction for a serious traffic violation driving a commercial vehicle?

A. No.

[77ER] Q. Do you have no more than two convictions for any other moving traffic violations while operating a commercial motor vehicle?

A. No.

Q. Okay. There are also some reporting requirements listed here on the waiver. It says, "There are six reporting requirements which must be met in full during the term of this waiver." Now, you haven't had a moving traffic violation, is that correct, since you got the waiver?

A. No.

Q. It's not correct or you haven't had one?

Have you had any moving violations since you got the waiver?

A. No, I haven't.

Q. Okay. No. 4 says, "Submit documentation of an annual examination by an ophthalmologist or optometrist at least 15 days before the annual anniversary of the effective date of the waiver." The effective date of the waiver is 2-25-93. So in February of '94 or before then did you submit documentation of an annual examination by an ophthalmologist or an optometrist?

A. Yes.

Q. And who was that optometrist or

[20SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 31. The first page of Exhibit 31 is a physical examination form which also states meets Department of Transportation requirements. It's signed by Dr. Robert Eubanks. It's dated August 18, 1990. And it reports that the vision in your left eye is 20/70. Have you seen this before?

A. No.

Q. Do you have any reason to doubt that that was your actual vision in your left eye as of August of 1990?

A. It's never been that, that I know of.

Q. Okay. And your basis for believing that is what?

A. Well, it's always been 20/200 in that eye.

Q. And you told me before that you know it hasn't changed because you've been looking out of it all these years and you can tell it hasn't changed. Did you get any medical opinion prior to August of 1990 that told you that the actual number vision acuity for your left eye was 20/200?

A. Other than the other physicals I've taken [21SER] for my other doctors.

Q. Do you remember any of those doctors?

A. The Tillamook place.

Q. So you had had vision tests at the Tillamook clinic before August of 1990?

A. Yes.

Q. And they tested the acuity in your left eye?

A. They tested whatever needed to be tested.

Q. Do you have a specific recollection that they told you that your vision in your left eye was 20/200?

A. I think there's a copy of this somewhere from there.

Q. From the Tillamook vision clinic?

A. Yes.

Q. Do you know where that copy is?

A. No.

Q. The third page of this exhibit -- the second page is some regulations, again, from the Department of Transportation. And the third page is a report signed by

Douglas Eubanks, November I think it's 6th, 1992, and this is the one I think we were looking at before that shows the vision in your left eye at 20/200.

[22SER] Going on to the next page of the exhibit, it's, again, another physical examination form, this one signed by Theresa Eubanks. It's dated 2-5-91, and shows the acuity in your left eye as 20/100. Have you seen this report before?

A. Never.

Q. Were you aware that Dr. Bob Eubanks and Dr. Theresa Eubanks had previously believed that your eye was not as bad as 20/200?

A. No.

Q. Then there is a photocopy, the last page of this exhibit is the medical examiner's certificate signed by Dr. Douglas E. Eubanks -- it says Douglas Eubanks, excuse me, dated November 6th, 1992, stating that you are qualified only when wearing corrective lenses. Is that the Dr. Eubanks who did your physical in Portland?

A. It appears to be, but I've never seen this.

Q. Okay. You've never seen this card before?

A. No. And it says I'm qualified to drive.

Q. Did you sign it? Is that your signature?

A. They always have you sign these when you apply.

Q. So it's your understanding that this card would say that you are qualified to drive?

[23SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 32. It's a letter dated May 17, 1993, to Roy Dwiggins, business representative, Teamster's local 305, from Dona Adams Pike of Albertson's offering you, through the union, employment as a yard hostler. Have you seen this letter before?

A. No.

Q. Did Roy Dwiggins tell you about this offer?

A. Yes.

Q. What the letter says is, "If Mr. Kirkingburg is interested, he should contact Mr. Frank Riddle at the Portland Distribution Center." Were you made aware of that?

A. Yes.

Q. Did you contact Mr. Riddle?

A. Yes.

Q. What happened?

A. He said he didn't know anything about it.

Q. Then what happened?

A. He said he would have Ted call me.

Q. Did Ted call you?

A. Yes.

DEPOSITION OF BEATRICE MICHEL, OD

DIRECT EXAMINATION

By Ms. Gordon:

[199ER] MS. GORDON: Mr. Hunt, I don't believe we've had any records from that clinic. If you could get a release to them right away, I'd appreciate it.

MR. HUNT: Uh-huh (affirmative response).

MS. GORDON: Thank you.

Q. (By Ms. Gordon) You say that I've only asked you, and I have, about the Snellen acuity test and the field of vision test. Was there anything else given to Mr. Kirkingburg in any of those four -- excuse me, five examinations from this clinic that you consider to be important in terms of the kinds of things that the DOT looks for?

A. Color vision, which is normal. They asked me about

that on one of the reports. He does have strabismus which is an eye turn, since childhood in the left eye. He has exotropia where the left eye turns out which is the cause for the amblyopia which is the cause of the reduced vision in his left eye. And the color test reveals the presence of exotropia. I found that to be important.

A stereopsis test was done at the request also of the DOT. Stereopsis measures the depth perception at a near distance and gives an idea of [200ER] binocular function.

Q. When you say "near distance," how near?

A. Oh, 16 inches. Stereopsis is really the ability for both eyes working together to have depth perception limited to the short distances rather than the long distances. We rely on other cues for depth at the long-range distances.

Q. What cues are those?

A. Those are monocular cues to depth. And if I may, I'd like to just specifically go right from a text that will detail that, and I can make copies of that for you, too.

Q. Is this a text that you normally rely on?

A. Yes, and this is particularly pertinent for Mr. Kirkingburg as it is related to the diagnosis of strabismus, which is the eye turn.

Q. Can you, before you refer to a section in there, read into the record the title, the author?

A. Let me see if this is the author or the editors. It is a book by Gunter Von Noorden, N O O R D E N, MD. Title is Binocular Vision and Ocular Motility Theory and Management of Strabismus, and this looks like it's the second edition.

Q. And the publisher?

A. Publisher, CV Mosby Company.

[201ER] Q. Date?

A. Date, 1980.

Q. And the section you believe is particularly pertinent begins at page?

A. Page 29 through 32.

Q. In your own words, can you tell us what that means that is significant to Mr. Kirkingburg?

A. Well, I think there's a lot of misunderstanding about two-eyed vision and what cues are needed to have proper depth perception, particularly in a case like Mr. Kirkingburg. I would assume that that would be at issue.

People, I think, assume that two eyes are needed for full depth perception when in fact there are significant monocular cues to depth that rely on the vision of one eye only to allow a person to have correct spatial orientation.

And those monocular cues, just briefly, the first is motion parallax. When you see two items, one in front of the other, and as you move your head the apparent movement of the farther object is larger than the near object, and that allows you to localize where those objects are in space.

Linear perspective is the idea where an object that has the same size as it moves away from [202ER] you appears smaller, much like railroad tracks appear to converge together off in the distance.

Overlay contours is the aspect where when two objects, one is partially blocking the other, we have learned on the monocular basis that the one that is in front of the partially blocked is the near object.

Distribution of highlights and shadows, this is particularly important because our assessment of shadows, like in sunlight, give us strong cues to depth.

Size of known objects, if you know the size of an object, you can judge how far away it is from you by its relative size.

Aerial perspective, that's the influence of the atmosphere, and these are the monocular cues to depth which are also important.

So while the stereopsis test is the test that's required and asked for by the DOT, in certain situations like distance viewing, it's not going to be a really particularly relevant or necessary skill.

Q. What, if any, test did you perform on Mr. Kirkingburg

at any point in time which would tell you what his depth perception is with these [203ER] monocular cues?

A. There is no test, to my knowledge, available to test these cues. These are learned at an early age and universal to most people, and as far as I know, there is no test to quantify these.

Q. Does your book or your own personal experience as an optometrist give you any information whether nighttime or low-light situations would influence these various conditions that you've just described?

A. Nighttime and low light definitely influence a person's vision, but whether they influence a person's monocular abilities with regard to depth is not known to me. That's not what I think of when a person tells me that they have problems with nighttime viewing.

Q. But you have described something with sunlight reflecting on something.

A. For shadows.

Q. For shadows. Obviously at night you wouldn't have those cues, would you?

A. No, but you have, of course, other cues and you also have overhead lights. For instance, if you have streetlights, it would be a similar effect. Lights coming toward you, from behind you, all these [204ER] things would relate to the same phenomenon.

Q. Are there binocular cues that function for distance depth perception?

A. Not to the degree that they do at near. The stereopsis testing and the stereopsis skill is most typically for the near distance. It has its greatest influence at near.

Q. Are there nonetheless some binocular cues that two eyed, or people with good sight in both eyes, would rely on for distance depth perception?

A. Well, I would imagine so. Again, I'm not the expert in this area per se. My understanding is that it is most influential at the near distance and its affect -- and its impact on the

distance is not something that I can quantify for you.

Q. And are you certain that the big E is the 24/100 test?

A. Yes.

Q. As opposed to a 22/100 test?

A. Yes, on my Snellen chart, that is true.

Q. Is the Tillamook Vision Center your employer?

A. Well, the professional corporation, Halperin and Michel, ODs, PC, is my employer.

Q. So you are a partner in this business?

* * *

[205ER] you've already told us about?

A. Yes. for this particular instance, for applying for the federal waiver, I relied on the federal register dated March 1992 in which we were specifically asked to comment on the visual acuity ability of this patient, as well as the Oregon DMV statutes for noncommercial vehicle use in which I work with patients oftentimes who have been asked to have me evaluate their vision in order to qualify for a conventional license.

Q. And now you're referring to the waiver program which would allow someone with a conventional noncommercial Oregon license to qualify for a waiver; is that right?

A. With the Oregon DMV, yes, that's noncommercial. But in basing my reports, I relied on the premise of that federal register for that waiver program.

Q. Is it your understanding under the federal register waiver program that one of the things that would qualify someone for a waiver would be a noncommercial regular driver's license from the State of Oregon?

A. No. In my mind it had only to do with their commercial driving record as well as their [206ER] visual acuity. With regards to requirements regarding the driving record, I did not really address that because that was not at issue for me but specifically just addressed the visual acuity

information that was needed to obtain the waiver.

Q. So you did not take into account, to any extent, whether or not Mr. Kirkingburg had a valid Oregon driver's license; is that right?

A. That is correct, because I was not asked to comment on that. What I was asked to comment on is whether or not his visual abilities were sufficient for safe driving. And given the requirements that I've seen for noncommercial use as well as the requirements for the federal register, I felt that he would be competent to drive from a visual standpoint. As to other issues, of course I cannot address that.

Q. Did you and Mr. Kirkingburg discuss the kinds of trucks and kinds of conditions in which he drives?

A. Not specifically, but I understand he was driving a commercial truck for Albertson's.

Q. Do you know where he was driving that truck?

A. I do not.

[86SER] Q. Do you know under what conditions he was driving that truck?

A. I do not.

Q. Do you know if he drove at night?

A. I do not.

Q. Do you know if he left the state of Oregon?

A. I do not.

Q. Do you know if he ever had more than one trailer?

A. I do not.

Q. You understand what it means to be under oath?

A. I do.

Q. And you know you're under oath today?

A. I do.

Q. You know that if your answers to any questions were different at another point in time, it could be used to show that you were not being truthful?

A. I do.

Q. Have my questions been clear?

A. I hope so. I think so.

Q. If I ask you a question you don't understand, will you let me know?

A. I will.

* * *

[207ER] Q. Do you have any recollection whether the FAA for pilots has a requirement that each eye needs to independently meet a certain standard as opposed to a combined reading?

A. Again, to my recollection, I believe not. I believe it has to do with two-eyed acuities. And I believe, if I'm correct, it might even have to do with what the unaided acuity is at near is more critical to them. But again, I'd have to consult my records on that.

Q. Do you have any medical opinion whether Hallie Kirkingburg at this time is safe to drive an 18-wheel truck with a trailer over state and interstate commerce?

A. On the basis of his vision, I would say that he meets the criteria that I have been asked to comment on.

Q. And those criteria are the ones in the waiver standards of DOT as opposed to the regular standards; is that right?

A. That is correct.

Q. Are you familiar with the purpose of the waiver program, federal waiver program?

A. My understanding of the purpose of the [208ER] waiver program is to conduct a study to assess whether or not the vision standards could or should be relaxed for commercial motor vehicle drivers, and that this study was being conducted over a period of years and they were selecting people to participate in the waiver program with what is considered less vision than the current requirement has compared with the control group.

Q. Do you have any medical opinion whether Hallie Kirkingburg would be a better or worse driver than someone with good binocular vision under the conditions I previously

asked you about, over the road, interstate driving with a couple of trailers?

A. Well, if that is the only basis of judgment, I would say he would be equally competent because, again, this has been a lifelong condition. He has made adaptations and adjustments which work very well for him, and I don't think that he, on the basis of vision alone, would be better or worse than someone with binocular vision.

Q. What adaptations and compensations has Mr. Kirkingburg personally made on the basis of his eye long vision -- or his lifelong vision?

A. Well, if someone is newly --

Q. Not someone. I'm asking you about your [209ER] patient, Hallie Kirkingburg, that you personally know as his physician, what adjustments or adaptations he personally has made, not what someone you imagine would have done with his vision.

A. I see. Mr. Kirkingburg, having had this condition since childhood, has not had binocular vision since childhood, and given that, has always functioned as a one-eyed person and has always relied on monocular cues.

The reason why this is sufficient, this is different for a person who is newly one eyed. For a person newly one eyed who has relied generally on two-eyed vision, much more adaptation is required because this is a new way of vision for them. They have to compensate in ways that Hallie has learned as a child.

Q. I understand the answer you're giving me, but my question to you is, are you making assumptions because Mr. Kirkingburg has been monocular since birth as opposed to having run some specific tests or made some specific observations on him that tells you that he's functioning that way today because he's been monocular since birth, or is this something that you generally believe is true?

A. I generally believe this is true.

DEPOSITION OF CHARLIE NORRIS
DIRECT EXAMINATION

By Mr. Busse:

[81ER] Q. How long were you there?

A. At Albertson's in Portland?

Q. Yes.

A. From March of '88 to June of '94.

Q. What job title?

A. Personnel Manager.

Q. Who did you report to?

A. The controller, who was Martin Teal at that point in time.

Q. The controller?

A. The controller.

Q. Martin Teal. T-i-l-l?

A. No. T-e-a-l. He was the first controller.

Q. Where was his office?

A. His office was in the distribution center, second floor.

Q. Who did he report to?

A. The general manager.

Q. Who was that, as of November '92?

A. Frank Riddle.

Q. What were your job duties, as personnel manager?

A. I was administrator of employee benefits, hiring and selection, administering Workers' Comp claims, employee morale.

Q. How about training and discrimination requirements?

[82ER] A. That was handled out of our corporate office.

Q. Was there any training by your corporate office, then, in the requirements of the Americans with Disabilities Act at the Portland distribution center prior to November of 1992?

A. I believe there was.

Q. And did you receive any training?

A. Yes.

Q. So you became acquainted with the employer's obligation to reasonably accommodate disabilities; correct?

A. That's correct.

Q. And you knew that that was a balancing of the requested accommodation against the undue hardship; right?

MS. GORDON: Object to form.

Answer, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. I'm not familiar with that.

Q. In any of your training that you were given, were you told that, in determining whether or not a requested accommodation was reasonable, the employer could take into account whatever undue hardship was presented to it?

MS. GORDON: Same objection.

[83 ER] THE WITNESS: I wouldn't remember that.

BY MR. BUSSE:

Q. Pardon?

A. I wouldn't remember that.

Q. Have you ever heard the term "undue hardship" in the context of reasonable accommodation under the ADA?

A. I don't remember that.

Q. Can you tell me what undue hardship would have been caused to the company by accepting a vision waiver in Mr. Kirkingburg's case?

MS. GORDON: Object to the form, calls for speculation, no foundation.

Go ahead and answer, if you can.

THE WITNESS: No, I don't.

BY MR. BUSSE:

Q. As far as you knew at the time of his termination, was he a good driver for the company?

A. I wasn't familiar with his driving record. I wouldn't have been privy to that.

Q. Were you a part of any conversation at which the termination decision was discussed?

A. Only on the day that it happened.

Q. Tell me what you recall.

A. I recall being called to Ted Sturgill's office to witness a phone call to Hallie Kirkingburg.

[84ER] Q. And what was said in that conversation?

A. I don't remember the exact content, other than the fact that his termination with Albertson's was -- or, his employment with Albertson's was terminated as of -- and I don't know the exact date that was quoted at that point in time.

Q. Was there some reference to vision waiver in that conversation?

A. Not that I remember.

* * *

[85ER] Q. Do you recall discussing what other work could be available to the employee as an alternative to termination?

A. No.

Q. Do you recall that anyone else discussed whether there was any other work that could be made available to Mr. Kirkingburg?

A. No.

Q. After the termination decision, what next [39SER] involvement did you have in the subject of his employment or termination?

A. I made one employment offer to Hallie.

Q. How did that offer come to you?

A. The general manager said that there was a -- "a tire mechanic position available. I want you to call Hallie and

offer it to Hallie."

[41SER] Q. Do you have any recollection of the substance of the conversation that you had with Mr. Kirkingburg as to the tire mechanic position?

A. Yes.

[42SER] Q. And what do you recall was said in that conversation by you and by him, in substance?

A. I remember telling him that we had a tire mechanic position and would he be interested. And from what I remember, he said, "No, I'm not interested. I'm a truck driver, I'm not a tire mechanic."

Q. Is there anything else that you can recall in that conversation?

A. That's it.

Q. Now, we've talked extensively about your hiring process. Between the time of his termination and the time you made that offer, were there openings at that distribution center that were filled at Albertson's, to your recollection?

A. To my recollection, yes.

Q. In what positions?

A. That -- I wouldn't know exactly.

[42SER] Q. Now, Albertson's is a big employer. Is the Portland distribution center the only place of employment at Albertson's, besides the home office in Boise?

A. No, sir.

[86ER] Q. Did you have any disability discrimination training?

MS. GORDON: You're talking about at West One?

MR. BUSSE: Yes.

THE WITNESS: No, sir.

[86ER] Q. It doesn't matter. I withdraw it. Now, Exhibit 1, in the reasonable accommodation policy, it says, "The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company."

My question is, what undue hardship would have been caused to the company by reason of the acceptance of Mr. Kirkingburg's vision waiver, if you know?

MS. GORDON: Object to form.

Go ahead and answer.

THE WITNESS: I don't know.

[87ER] Here's another one. December 26th, 1992, Albertson's to transportation and/or personnel manager regarding DOT request for information. Do you recall having received that from Mr. Kirkingburg?

A. No.

Q. Have you ever seen that document before?

A. No.

Q. Do you recall anyone at Albertson's asking you to help him with his application for a vision waiver?

A. No.

Q. Do you recall taking any action to help him obtain his vision waiver?

A. No.

[88ER] A. Did I know if he had prior qualifications to perform the tire mechanic position?

Q. Yes.

A. No, sir.

Q. You were just following instructions.

A. Yes, sir.

Q. Did anybody ask you to look for work for Mr. Kirkingburg, other than having to do with the one offer of the tire mechanic slot?

A. Not that I recall.

DEPOSITION OF FRANKLIN DELANO RIDDLE

DIRECT EXAMINATION

By Mr. Busse:

[91ER] Q. What was your last position at Albertson's?

A. I was general manager of the distribution center in Portland.

Q. For how long did you hold that job title?

A. About seven years.

[92ER] Q. Can you tell me what efforts you made to reasonably accommodate Mr. Kirkingburg prior to his termination.

A. Mr. Kirkingburg was offered different positions, not by me but by -- by others.

Q. Anything else?

A. No, not from me.

Q. And I take it that, before terminating him, you expected those other persons under your supervision to have looked for those other positions. Correct?

MS. GORDON: Object to form, lack of foundation. Answer, if you can.

THE WITNESS: Well, not exactly. The -- not before termination.

BY MR. BUSSE:

Q. Okay. To your knowledge, was there any effort to look for other work for him prior to his termination?

A. Yes.

Q. Tell me what effort there was.

[93ER] A. There were other jobs discussed, and those jobs were jobs that we felt that he was -- could be -- that would fulfill the need at the time.

Q. What jobs were discussed?

A. There was a yard hostler job, a fueling -- fueling or -- tire man job. And I don't recall, there were -- might have been others, but I don't recall what they were.

Q. Now, we're talking about prior to his termination; is that correct?

A. Well, at the time of his termination, or thereabouts.

Q. Well, that's what I'm asking you.

A. Well I don't know whether it was before or after, but it was all in the same period of time.

Q. Well, my question is pointed toward a specific period of time. Do you know of any effort that you made to find him other work prior to his termination on November 20th, 1992?

A. No.

Q. Do you know of any effort that anyone else made to reasonably accommodate him by finding him other work prior to November 20th, 1992?

A. I believe there was effort by others.

Q. What is your basis for that belief?

A. Conversations that I had with our personnel manager [94ER] at the time.

Q. And who was that?

A. Charley Norris.

Q. What did you and Mr. Norris discuss, prior to Mr. Kirkingburg's termination, about other work for him?

A. Just what I've said, the various jobs that I've mentioned.

Q. So you recall that this was before the termination that these discussions took place?

A. I don't recall that.

Q. Well, that's what I'm asking you. I want you to be careful in your testimony. I've asked you for efforts that you knew of that others undertook prior to his termination. Do you know of any such efforts?

A. No. I can't specify the date.

Q. Who made the decision to terminate my client?

A. I did.

Q. And why was he terminated?

A. The -- the review of his DOT file indicated that he was not qualified under the DOT minimum requirements.

Q. And what minimum requirements are you referring to?

A. Vision.

Q. Did you use the DOT requirements as the standard for Albertson's?

A. I'd have to qualify that by saying I believe that's [95ER] correct, but the discussion was carried on between myself and corporate offices, so I would assume that it was.

Q. When you say "corporate offices", I need a person. Who was that?

A. Dona King.

Q. And?

A. Bruce Paolini.

Q. Anyone else?

A. Scott Jardine, in all probability, would have been the other.

Q. Let's go back to my question. Do you know of any physical qualification standards that Albertson's had adopted prior to Mr. Kirkingburg, apart from the DOT standards?

A. Would you state that again.

Q. Do you know that they had their own physical qualification requirements?

A. We had physical tests, the ergonomics test that was administered, and I'm not sure if that would superseded, but we have -- basically our drivers are required to meet the DOT minimum requirements.

Q. As to vision, is there anything but the DOT requirements?

A. Not that I'm aware of.

Q. So you went by whatever the DOT established; [96ER] correct?

A. It was in the -- whatever's in the -- No. We went by the minimum requirements established in the DOT manual.

Q. Was there anything in writing that said, "We're going by the minimum requirements", to your knowledge?

A. I don't recall.

Q. Is it your understanding that the DOT's requirements, in the DOT manuals, say "minimum requirements"?

A. Yes.

Q. What if the DOT changes their minimum requirements? Would you accept those?

A. Yes.

Q. All right. What if the DOT provides that, "To accommodate persons who are disabled, we may waive certain of those requirements"? Would you accept that?

A. No.

Q. Why not?

A. The waiver has to be a two-way street. We did not accept waivers at all.

Q. But why not?

A. We felt that it was a matter of safety. We were solely concerned about the safe operation of our vehicles.

Q. If the DOT, in its regulations in adopting a waiver of the vision requirement, would narrowly confine those [97ER] waivers to certain circumstances to provide for safety, would you accept that?

MS. GORDON: Object, calls for speculation.

Answer, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. I can't say what may happen now. At the time, we -- we were concerned about the minimum requirements in the DOT manual, the minimum DOT requirements. Waivers, we did not accept.

Q. Even if a person could drive safely who was eligible for that waiver?

A. We --

MS. GORDON: Object to the form of the question.

Go ahead and answer it, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. We felt that safety -- the safety risks far overrode the -- the ability -- the waiver requirements. We felt that it was too great a risk to have the highway --

Q. Did you know Mr. Kirkingburg as a driver, prior to his termination?

[98ER] A. Yes.

Q. And did you know him to be a good, safe driver?

A. I had no -- Yes.

Q. Can you tell me what additional safety risk Mr. Kirkingburg presented on November 20th, 1992, that he had not presented earlier?

A. His vision, clearly, was a problem.

Q. In terms of any difference or change in safety, can you tell me what additional safety risk he presented in November of 1992 that was not presented earlier?

A. Well, when we hired him, his vision was -- met the minimum requirements. At the time that this occurred, the

DOT tests showed that he did not meet the minimum requirements. So there had been a deterioration, based upon the reports that I received.

Q. Was it your understanding that his vision in his left eye was always 20/70 or better during his employment at Albertson's?

A. No.

Q. What was your understanding --

A. It was 20/70 at the time we hired him.

Q. And?

A. And at the time this transpired, we found that -- or, it was reported to me that his vision had gone to 20/200 in that eye.

[99ER] Q. I take it that you looked at the DOT file.

A. I saw the report -- the card that the report came through on and the file that showed the -- the last test that it showed, I don't recall.

Q. Well, Mr. Sturgill said that the vision tests are kept in the DOT file. And I take it that, before passing on this man's employment, you would have reviewed the DOT file --

A. I did not look at the DOT file at the time. I was -- had a conversation with the people, and they were -- Ted Sturgill and others, and they reviewed that manual with me. I did see a card was all I saw.

Q. Before terminating him, did you go back to see if Mr. Kirkingburg could provide any further history concerning his vision and whether or not it had, indeed, deteriorated?

A. The matter was handled by others after that.

Q. What do you mean "after that"?

A. Well, Charley Norris, personnel manager, did the -- did the research and communications.

Q. You mean after you decided to terminate him?

A. Uh-huh.

Q. That's a "yes", for the court reporter?

A. Yes.

Q. Well, my question is, before making that decision,

[100ER] did anyone discuss going back to Mr. Kirkingburg to confront him with these findings to determine whether or not they were reliable?

A. I believe they did, yes.

Q. What is the basis for that belief?

A. Personnel manager would have done so, and I believe did so.

Q. And by "personnel" --

A. I had conversations with Charley related to that matter. I didn't do it, but I did have conversations with Charley on it.

Q. Tell me what conversations you had on that.

A. Concerning the fact that his eyesight had deteriorated and whether or not -- whether or not he had actually had the correct vision -- you know, had met the requirement at the time we hired him. And he had, at the time.

* * *

[101ER] Q. Okay. My question has to do with any conversations that you had with Mr. Norris or anybody else that would direct them to go back to Mr. Kirkingburg to confront him with these findings to ascertain whether or not they were reliable.

A. Yes.

Q. Okay, tell me what you know about that.

A. I discussed with Charley the need to review his file and review with him.

Q. And by "him", you're talking about Kirkingburg.

A. With Kirkingburg.

Q. And so you expected Mr. Norris to do that; right?

A. Yes.

Q. Do you have any knowledge whether or not Mr. Norris indeed did that?

A. I -- He did.

Q. Who told you that?

A. I have seen notes to that effect.

Q. What notes are you referring to?

A. Notes from Charley's -- Charley had made on

* * *

[102ER] A. Well, as I indicated, we had the tire maintenance guy's job, we had the fueler's job -- actually, had a -- mechanics and, of course, warehouse persons.

Q. Does the warehouse-type job come available from time to time?

A. Yeah.

Q. Do you recall whether or not there were any openings on that side?

A. Are any or were any?

Q. Were any.

A. I'm sure there was.

Q. Do you know that wasn't offered to Mr. Kirkingburg?

A. Well, he would have -- had he expressed an interest in it, we would have given him the opportunity. We require all of those folks to take a -- the ergonomics test. And had he applied and passed those, he would have been accepted, I'm quite sure.

Q. How about the mechanic's job? How many mechanics did you have?

A. Well, there was, I think, 12 at the most, and I don't know what there is now.

Q. What do these people do as mechanics there?

[103ER] A. They repair tractor engines, tractors, trailers, the various parts of the automotive equipment.

Q. What training are they typically given for that work?

A. Well, generally they are hired as experienced people. And those who are not are hired as an apprentice of sorts and have some experience but given -- are allowed to work on that training-type thing toward a mechanic's positions.

Q. Do you know how many of the 12 positions are the apprentice type? Or is there any set number?

A. I don't know. There was never any -- we had no set number, but I don't know what there was.

Q. So you have hired apprentices, or persons to be trained into that mechanic's position, prior to that time.

A. Well, in reality, no. We hired the fuelers and -- the fueling position, we frequently -- not frequently, but occasionally, when a opening developed in the mechanics, would provide -- if someone had some talent or interest, they would be moved into that -- into that apprenticeship training program.

Q. You mean like in a service station, a guy that's a gas jockey will then move into the garage and do the tune-ups, that sort of thing?

A. Yeah, same or similar, yeah.

[104ER] Q. How many fuelers did you have?

A. There was two when I was there. I'm not sure --

Q. Were there any fueler positions available, if you know?

A. There were occasionally. I don't know what --

Q. I take it, from your comments and your testimony, that you did not take it upon yourself to be the one to look for this other work that you could offer to him.

A. No.

Q. But you had subordinates under your supervision that you expected to do that.

A. Yes.

Q. What person did you expect to fulfill that?

A. Charley Norris was our personnel manager.

Q. Do you recall, before Mr. Kirkingburg was terminated, that Charley Norris presented you with any kind of verbal or written report about the results of his search?

A. Charley and I had conversations on the fuel -- the tire man and the yard hostler. I don't recall any others.

Q. And you testified earlier that you weren't really sure whether those conversations took place before or after Mr. Kirkingburg's termination; is that correct?

A. Yes.

Q. What can you tell me were the substance of the

* * *

[105ER] yourself, about why that would be an appropriate job for Mr. Kirkingburg to perform?

A. Well, he's a driver, and you had to be able to drive to do that job. You know, you had to be able to handle the equipment to do that job. It was felt that that was a reasonable alternative to him driving on the road.

Q. When you say as an alternative to be driving on the road, where does the yard hostler drive these trailers?

A. Within the confines of the facility.

Q. So they're not allowed to go outside?

A. Oh, under -- if they are fully certified, yes, they do go out.

Q. But they don't necessarily have to.

A. They don't necessarily have to.

* * *

[106ER] Q. Now, did you receive any report back from Mr. Norris or Ms. Pike or anybody else about the interaction between Albertson's and Mr. Kirkingburg on the tire man job?

A. Yes. I was told by Norris that he had refused the -- the offer.

Q. Did he say anything else besides that?

A. He just said Mr. Kirkingburg said he was a driver and that's all he wanted to do, is drive.

Q. Is there anything else that Mr. Norris reported back to you from that conversation?

A. Not that I recall.

Q. How about a report back concerning the yard hostler position? What do you recall hearing about that?

A. I -- the only thing that I -- report that I got was that he

had -- that he had -- had rejected it. I don't -- I didn't hear any further.

Q. Who told you that he had rejected it?

A. I'm not real sure. I think it was Charley Norris.

Q. Did you make any decision to withdraw the offer of the yard hostler position?

A. I did not.

Q. Did you hear that it had been withdrawn by anybody else?

A. No, not really.

[55SER] Q. Did you have anything to do with making the decision to give him another examination, at the time that he was released to go back to work in November of '92?

A. Yes.

Q. What discussion did you have with anyone about that subject?

A. I directed Norris and Sturgill that he was returning from injury, that he would be -- have to be recertified, which we do, DOT certification physical.

Q. How often did you do that and under what circumstances, when somebody was returning from injury leave?

A. That all -- everybody who returns from injury leave is recertified.

Q. I mean, even like after one day or three days, or what?

A. Oh, no. Extended period of time.

Q. Is there any rule?

A. Not that I know of.

Q. Exhibit 1 is a policy. Have you seen this document before?

[56SER] A. Today is the first time.

Q. It says here, "The company will afford reasonable accommodation to applicants and employees with a known

disability as long as such accommodation does not cause undue hardship to the Company."

Can you tell me what undue hardship it would have caused to Albertson's to have accepted the vision waiver?

MS. GORDON: Object, to the extent it calls for a legal conclusion.

Go ahead and answer, if you can.

THE WITNESS: The only concern we had -- still had, as far as I know, is pure and simple safety, the safety of a person who has a vision problem driving a rig. We considered that to be the -- the risk to be too great. I don't know that --

The answer to your question is that the only undue hardship would be the potential risk to the company of a tremendous loss involved in an accident.

BY MR. BUSSE:

Q. To your knowledge, while he was driving for Albertson's, was he a safety hazard?

A. Not that I know of.

Q. Exhibit 2, this is an excerpt from the Albertson's distribution center driver's manual. He wasn't terminated [57SER] for violating any policy, that you know of, in the driver's manual, was he?

MS. GORDON: Take whatever time to read it, if you want to.

THE WITNESS: Let's see. No.

[57SER] Q. I've been given some other documents. There's a photocopy of his driving history. He wasn't terminated because of anything that appears on Exhibit 3, driving history, was he?

A. No.

Q. And I've been given a copy of his statement of compliance with the distribution center personnel policies. He wasn't terminated for violating any personnel policy, that you know of, was he?

A. No.

Q. And I've been given a copy of an incident record, something that happened back in 1990. He wasn't terminated for any warning notice that he received then, was he?

A. No.

Q. I've been given an absentee calendar. He wasn't terminated for anything that appears on the absentee calendar '91, Exhibit 6, was he?

A. No.

* * *

[107ER] Q. So in all cases of a practical matter, they're not supposed to go outside the yard.

A. With the equipment they're using. I presume that all of them there are still certified drivers that can, if they have the appropriate equipment to go outside the yard. But the job can -- it has been structured so it could be retained in the yard.

Q. Do you know of anyone who was a yard hostler who was not DOT certified?

A. No.

Q. Why would somebody be DOT certified and, yet, not be a driver but a yard hostler? I mean, it doesn't sound like something they'd choose to do.

A. They probably wouldn't choose to do it. Again, it's a combination -- that job can be performed by someone who does not have to go -- that doesn't necessarily have to go on the street. So that would be some accommodation. Or if they found an appropriate individual who could do the job extremely well but didn't want to drive on the street, then you have someone -- you could do that.

Q. Have there been people like that?

A. We've had people who were not permitted on the [108, 109ER] street as a yard hostler, yes.

Q. What would be some of the reasons that they're not permitted on the street?

A. License restrictions, not necessarily DOT, but restrictions that they not be -- temporary restriction, not be allowed to drive.

Q. Because of some other problem --

A. Alcohol, or something of that nature.

Q. So, license restrictions. What would be some of the other reasons, in your experience, that people have relied upon to get that assignment?

A. I haven't had anyone approach me on the thing, and so --

Q. Is it a permanent or temporary assignment?

A. It's -- I guess depends whether you want to stay there and do the job all the time. There are opportunities to get out of that job. Let's say a driver is a license -- a certified driver and wants to go back on the street. He simply, when it's his turn to bid, bids on the run to go on the street, and then someone else fills that job.

But if you want to stay there, you can, in all probability. I would imagine there are people that have been hosting since day one, people who don't like to be aware from home overnight or ---

[110ER] MS. GORDON: Are you speaking from direct knowledge now, Frank, or are you guessing?

THE WITNESS: Guessing.

MS. GORDON: Well, don't guess, please.

THE WITNESS: Well, let me rephrase. No, that is not necessarily true. I have direct knowledge that the job can be permanent, if they choose to be. That's not a guess.

BY MR. BUSSE:

Q. Did you know that, after his termination, Mr. Kirkingburg was requesting the assistance of Albertson's to help him get a vision waiver?

A. I was apprised of that, yes.

Q. Who apprised you of that?

A. Charley Norris, the personnel manager.

Q. Did you give him any instructions as to whether or not

--
MS. GORDON: Let him finish his question.
BY MR. BUSSE:

Q. Did you give him any instructions as to whether or not to assist Mr. Kirkingburg in obtaining that vision waiver?

A. I told him not to; that we would take that up with our corporate people, and we did so.

* * *

[58SER] Q. Had a vision-waiver issue come up prior to that time?

A. Not that I'm aware.

Q. Did a vision-waiver issue come up after that time?

A. I'm not aware of one.

Q. What discussions do you recall having with Scott Jardine on the issue of whether or not to accept a vision waiver?

A. Well, my discussions had to do with the two -- do some research within the company to find out whether we had any -- anyone on waivers, to -- basically, to determine what the company's position would be on the matter.

Q. Okay.

A. And to so advise.

Q. When you say "so advise" --

A. Well, to get back to me on what his findings were and to our -- to his counterparts in Boise, the labor relations people.

Q. And what did he advise you?

A. He told me that we had no one on waivers in -- any driver on waivers throughout the entire company.

Q. Did he give you any other information as to what the position would be in Boise as to whether or not to accept vision waivers?

[59SER] A. At that point, the decision was not to accept them.

Q. So did you make that decision --

A. No, I --

Q. -- or did they make that decision?

A. It was a decision given to me.

Q. Okay.

A. Or, I -- perhaps that -- a decision that I made and that was agreed to in Boise with Scotty, and the corporate people agreed to that decision.

Q. So you're saying you made the decision, and they supported you?

A. I -- No. It was a corporate decision. Let's say I was a party to making the decision.

Q. When you say "it was a corporate decision", what do you mean?

A. Well, they could have easily overrode me without any problem.

Q. So did you say, "This is what I decide, and I want your approval," or did you say, "That is what I think. What do you think?," and then it was a joint decision, or -- I need your best description of how that decision was reached.

A. Well, what it -- I discussed the situation with Jardine. He then discussed it with others and researched the company, and he got back to me and said, "This is

* * *

[111ER] A. I directed Norris to look into the matter, and I assumed that would be part of the follow-up.

Q. In Exhibit 47, it says, "The first position was a yard hostler. The second position was working in the shop. Mr. Kirkingburg declined to accept either of these positions."

Do you have any information that Mr. Kirkingburg declined the yard hostler position?

A. Only as it was relayed -- related to me from Dona King.

Q. In Exhibit 48, February 28th, 1994, Ms. King's -- I'm

sorry. Dona Adams Pike? Is that who you're talking about?

A. Yeah. I think she's married -- Pike was her name, Dona Pike.

Q. There we go. In Paragraph 2 of Exhibit 48, Page 1, it says, "When the position of yard hostler was offered, Mr. Kirkingburg did not immediately accept it, and although the company had intended to restrict Mr. Kirkingburg to driving in the yard only, we became concerned because the position does require DOT certification. Accordingly, the offer of this position was withdrawn."

Were you aware that the offer of the yard

[112ER] Q. Did those persons also discuss with you, not as lawyers but also as personnel administrators, this issue?

A. No. Most of what I had to say with those folks was related to the company's position. I would consider that to probably be more legal than anything else.

Q. The corporate decision?

A. Well --

Q. Whether or not to accept the vision waiver, isn't that a policy decision that somebody reached?

A. I don't know that.

Q. Interrogatory 2, "Please state why Plaintiff was terminated." "Answer: Plaintiff was no longer able to drive for Albertson's under the term of Albertson's company regulations. He was offered and refused accommodating employment. Because of his refusal of these employment opportunities, plaintiff's employment with Albertson's was terminated."

Is that true?

A. It's true. However, he wasn't terminated because of his refusal. He was term -- the termination date, obviously, would have preceded that. However, it is not uncommon for us to review all terminations -- or, any termination and rescind

that, based on the decision -- based on the circumstances at hand.

Q. So what you're saying --

[113ER] A. I'm thinking that was probably a broad -- I mean, a narrow answer to that question. My statement would be that his -- his -- I can't tell you about the dates. All I can tell you, had he accepted those, he would have been employed. Had he accepted either one of the offers, he would have been employed, with no loss of seniority or time.

Q. But you're also saying that it's incorrect that he was terminated for refusing them, because he didn't refuse them until after his termination; right?

A. That's correct.

Q. Okay.

A. I think that's correct. It could -- Again, Charley Norris had much of the communication, so it is possible that some conversation happened that I'm not aware of prior to that. But I know, had he -- had he accepted either one of those, he would have been working.

EXAMINATION

By Ms. Gordon:

[61SER] Q. Did Mr. Kirkingburg ask you about any accommodation, other than asking you to accept a vision waiver?

A. Not me.

Q. Do you know if he asked anybody about any accommodation, other than saying he wanted to drive and that he wanted to use his vision waiver?

A. To the best of my knowledge, he did not.

Q. To your knowledge, did he ask anybody about a job in the warehouse?

A. He did not.

Q. And as far as you know, had he ever indicated he had any interest in working in the warehouse?

A. He did not.

Q. I'd like to go back to Exhibit 2 that Mr. Busse asked you about, the driver's manual. There's reference in here to -- And I'm reading from the third paragraph on the final page of this excerpt, which is Page 5. It says, "As an Albertson's driver, you are required to comply with [62SER] all Department of Transportation, Interstate Commerce Commission and Company safety rules."

Did Mr. Kirkingburg's termination have anything to do with that requirement?

A. Yes.

Q. In what sense?

A. Well, he failed to meet the minimum DOT requirements, visual requirements, which would be covered under that sentence.

Q. And did it also concern safety?

A. Yes, absolutely. Safety's the entire -- primary concern of the company.

RIDDLE EXHIBIT #2

Albertsons

I, _____

NAME

**RECEIVED ALBERTSONS
PORTLAND DISTRIBUTION CENTER
DRIVER'S MANUAL ON**

DATE

SIGNATURE

The first Albertson's Food Center was opened in Boise, Idaho, at 16th and State Street in July of 1939, under the personal management of Joe Albertson. The first year's operation was successful and in 1940 stores were opened in the adjoining towns of Nampa and Caldwell, Idaho. Since that time, the Company has grown to 689 modern food stores located in 19 Western, Midwestern and Southern states. Albertson's has 17 division offices and retail operations are supported by 11 Company-owned distribution centers.

It is strict policy of our Company to deal honestly with all employees, customers and suppliers. All employees are expected to comply with this policy.

We are an equal opportunity employer. We guarantee to all persons the opportunity to work and earn a living according to their abilities and qualifications, with regard to considerations of race, color, religion, national origin, sex or age. It is our policy to insist upon strict compliance with both the letter and the spirit of this law, by and among all employees, on all levels in every division of our Company.

Every employee is vital to Albertson's success. It is our philosophy that 50% of our salary is paid for the service we render the customer, and 50% for the other work we do.

VEHICLE SAFETY

Of all your responsibilities as an Albertson's driver, your safety responsibility is the most important, above all, driver safety. Safety comes first. In the operation of all equipment, regardless of all other requirements, proceed safely. Never drive into uncertainty.

The constant practice of defensive by being alert, using good judgment and taking no chances, will prevent most accidents

before they occur. Because of the hours you put in behind the wheel, it becomes very easy for you to let your safety awareness slip. This can be a fatal mistake. Basically, safety is an attitude that will keep you both consciously and subconsciously safety alert. We will help you directly with incentives such as safety award programs for safe operation. Indirectly, Albertson's will constantly provide you with safety reminders and checklists.

As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules. You have been issued a Motor Carrier Safety Regulations manual and you are required to abide by its instructions. This compliance is nothing new to professional line operators and comes with the job. There are, however, some safety guidelines that Albertson's feels should be stressed and these are listed as follows:

1. Drivers must stay within the hours of service regulations set forth by the D.O.T. If you are low on hours, contact your dispatcher so that you will not be dispatched without proper rest. Logs must be kept up to the last change of duty.
2. Drivers are required to operate their equipment at speeds consistent with the existing laws in each state and with road and traffic conditions. Albertson's maximum speed limit is 55 MPH.
3. Always make certain that you have all the necessary safety equipment before you start a trip, which are (a) full fire extinguisher rated 5 B:C. or (b) 4 B:C. Securely mounted. Replacement fuses, unless circuit breakers are used. Three red emergency reflectors, which satisfy the requirements of paragraph (i) of this section, and two red flags, or three red emergency reflective triangles, which

satisfy the requirements of paragraph (h) of section 393.95 of Motor Carrier Safety Regulations, and three fuses.

4. Always be sure to check for sufficient clearance before changing lanes on interstate highways, when backing and in making right hand turns. Be careful.
5. Before each trip, check your fifth wheel to make certain that it is locked and that the landing gear on the trailer is raised and locked into position.
6. Be certain that all underpasses and overhanging docks have a minimum of 13 foot, 5 inch clearance for your trailer.
7. Truck accident experience has indicated that the most accident prone time for drivers is just before the early morning hours of daylight. Be especially safety conscious during this period of the day.

DEPOSITION OF GLEN SAYLER, MD

DIRECT EXAMINATION

* * *

By Ms. Gordon:

[78SER] Q. Did Mr. Kirkingburg have a partial color deficiency?

A. No.

Q. What test do you use for color?

A. I don't remember the name of it. Ishihara's.

Q. That little black book?

A. That little book, yeah, with the pages in it.

Q. And on each page is a circle, and if you can recognize the number, your color vision is pretty good; is that right?

A. Right.

Q. And what field of vision, if any, test did you do on him?

A. Confrontation, you know.

* * *

[79SER] Q. Now let's go to HK MD 00011. Can you tell us about that?

A. (pause; referring). What do you want me to tell you?

Q. Is this -- You had personal involvement with that --

A. Yes.

Q. -- document as well? What was your involvement?

A. Same as with the previous one.

Q. Did you certify Mr. Kirkingburg?

A. Yes.

Q. What was his acuity?

A. 20/15 on the right, 22/100 on the left.

Q. So his left eye had worsened; is that right?
A. Not necessarily.
Q. What was the date of that test?
A. 4/25/88. Actually, based on that, it couldn't have worsened because that was two years previously.
Q. So this one was 1990? Document No. 12 was 1990?
[80SER] A. That's what it says.
Q. And '88. So in two years, how -- do you have any explanation for how his eye could have gotten that much better?
A. That's within the range of variability from one time to the next.

Q. Do you have any understanding whether Mr. Kirkingburg has amblyopia in his left eye?
A. I don't know.
Q. Do you know if he has an eye disease or an eye injury?
A. I don't know.
Q. And how do you explain that type of an improvement in a two-year period?
A. Like I said, it's within the range of variability. You can do the same test two days in a row and you may get that variability.
Q. And did you pass him for the same reasons you've already described in regard to Exhb. 12?
A. Yes.
Q. What was his field of vision at the time of Exhb. 11?
A. Says 90 degrees both sides.
Q. And his color was still good?
A. Yes.
[81SER] Q. At that time you were filling out the bottom portion; is that right?
A. Yes.
Q. Let's look at Exhb. HK MD 00013. Is that a DOT physical exam that you gave Mr. Kirkingburg?
A. Yes.

Q. When was that?
A. 1992.
Q. And what was his acuity rating in 1992?
A. 20/25 on the right, 22/100 on the left.
Q. Did you pass him again in 1992?
A. Yes.
Q. And is that again because you thought he was okay to drive because he'd been driving?
A. Yes.
Q. But again, he would not have passed the DOT physical; is that right?
A. Technically not.
Q. There's something written here. Can you read what that is? It's just to the right of the acuity ratings.
A. (pause; referring). Without correction, right 22/100, left, I can't tell because it's not an adequate copy to tell what the left was.
Q. Okay. Thank you.

DEPOSITION OF THEODORE STURGILL
DIRECT EXAMINATION

By Mr. Busse:

[115ER] Q. As of 1992, November, were you acquainted with the employment of Mr. Kirkingburg?
A. Yes.
Q. And what did you think of him as an employee of Albertson's?

A. He was an average -- average driver.

Q. All right. What is your understanding of the reason why he was terminated?

A. Failure to pass a DOT physical.

Q. Was it your decision to terminate him?

A. No.

Q. Whose decision was it?

A. Boise legal.

Q. When you say "Boise legal", that usually means a person. Who is that?

A. I don't know who made the final decision.

Q. Who communicated to you that the decision was made by Boise legal?

A. The decision came to me from Frank Riddle.

Q. What did Mr. Riddle say? What were his words?

A. I don't remember exactly what his words were.

[116ER] Q. In substance.

A. That he had failed the visual part of the DOT and we were not taking waivers below the DOT minimum standard.

Q. In the context of explaining why he was terminated?

A. What was your question again?

Q. Well, we got into this by asking what is your understanding of why Mr. Kirkingburg was terminated. You recall that; right?

A. Yes.

Q. Okay. So when I asked you what Mr. Riddle said on that subject, you said, "He had failed his visual" and "We're not taking waivers". And my question to you was, in the context of explaining to you the reason for Mr. Kirkingburg's termination; is that correct?

A. Yes.

Q. Did Mr. Riddle also say who made the decision?

A. It was legal, Boise legal.

Q. Is that what he said?

A. I don't remember the exact words.

* * *

[117ER] Q: An average worker for the company. Apart from the fact that he was let go for the reason that you stated associated with the vision problem, is there any other reason that he was terminated?

A. No.

Q. It had nothing to do with his driving record?

A. No.

Q. Or any warnings or disciplinary actions he'd received?

A. No.

Q. Or his injury 801 claims, filings?

A. No.

Q. Or his attendance record?

A. No.

* * *

[118ER] A. Contacted Mr. Kirkingburg and told him that he was terminated.

Q. Had you been directed to tell him that?

A. Yes. He could not pass the minimum DOT.

Q. And had you been directed by someone to terminate him because of that?

A. Yes.

Q. Who directed you to do that?

A. That came from Boise legal.

Q. What person directed you to terminate him?

A. Frank Riddle.

Q. Okay, thank you.

In the conversation that Mr. Riddle and you engaged in which he directed you to terminate Mr. Kirkingburg, was there any discussion about any other work Mr. Kirkingburg could perform?

Q. I don't remember.

Q. You don't remember any discussion to that effect?

A. Most -- most all of this was handled between Boise and legal.

Q. That's fine. All you can tell me is what you know. Do you recall any such discussion?

A. Some conversations where there was a position for a tire person and a position for a yard hostler.

Q. Now, I'm talking about as of the time that you were [119ER] given direction to terminate him, as of November 20th, 1992, was there any discussion in that conversation?

A. I don't remember.

Q. Okay. Before terminating Mr. Kirkingburg, did you discuss with anybody in any other conversation the subject of whether there was any other work for him to do?

A. I don't remember.

Q. Did you discuss with Mr. Norris, the personnel manager, whether or not there were any openings available, to your recollection?

A. No, I don't remember.

* * *

[119ER] Q. Okay. You've told me about one conversation that you had with Mr. Frank Riddle in which he told you, "We're not going to accept a vision waiver. Terminate Kirkingburg;" right?

A. We don't accept anything below DOT minimum [120ER] standards on the waivers, and that's -- that's in the DOT regulations.

Q. Okay. You've just made a statement that's nonresponsive, but I will follow up, and then I'll go back.

Where does it say in writing, at Albertson's, that you will not accept anything below the DOT standards?

A. That's from Boise.

Q. Have you ever seen anything in writing to that effect?

A. No.

Q. Prior to November 20th, 1992, did you see anything in writing that was published by Albertson's that they would not accept a vision waiver?

A. No.

Q. Now let's go back to my question.

A. Okay.

Q. Apart from your conversation with Mr. Riddle in which he directed you to terminate Mr. Kirkingburg, before speaking with Mr. Kirkingburg to terminate him, did you have a conversation with anybody else on that subject, to your recollection?

A. Not to my recollection.

Q. In the conversation with Mr. Riddle, did the two of you discuss what it was about his vision that caused [121ER] the company concern?

A. That he was legally blind, or blind in one eye.

Q. Are those the words that Mr. Riddle used?

A. Yes.

Q. What was your understanding, at the time that you spoke with Mr. Kirkingburg, as to what the test that he has been most recently given by the company doctor showed as to what his vision was?

MS. GORDON: Object to form.

Answer if you can.

THE WITNESS: I don't remember the exact reading from the doctor.

BY MR. BUSSE:

Q. Did you, at one time, have that information?

A. Yes.

Q. Did you have it as of the time that you spoke with Mr. Riddle?

A. Yes.

Q. How did you get it?

A. The DOT recertification forms come back to us to go into the driver DOT file.

Q. When you say "the certification forms come back to us", you're referring to the forms that are filled out by the doctors?

A. Yes.

[122ER] Q. The examining physicians.

A. Yes.

Q. And so they come back to -- when you say "us", who in the company at that distribution center would have been the person to have received the form?

A. It could have come into my office.

B. When you say your office, are you talking about a secretary? To you personally?

A. Personally.

Q. To you; right?

A. Yes.

Q. And what do you do with it?

A. I give it to the safety supervisor, and he puts it in the DOT file.

Q. Who is the safety supervisor? Who was that, at that time?

A. I'm not sure.

Q. Is that person at the distribution center?

Am I using the right nomenclature? Is that called the distribution center?

A. Yes.

* * *

[123ER] Q. When you say "DOT file", is that for that particular individual, or would that be for all DOT examinations?

A. Particular individual.

Q. So each person has their own DOT file; right?

A. Yes.

Q. And that file, then, should contain the certifications that are received by you for what period of time?

A. They have to be recertified every two years.

Q. And so for what period of time were you involved in this process as it pertained to Mr. Kirkingburg?

A. Well, I'm over the department, so the total time that he

was there.

Q. So you would have received his prior certifications; correct?

A. Yes.

Q. What is your understanding as to who issues the card, the DOT card, to the driver?

A. It would be the examining physician.

Q. Does that examining physician then issue that certification directly to the driver, or does that go to you, as well?

* * *

[124ER] Q. Did you take any action to attempt to find him work, after that time?

A. I did not.

Q. Do you know of anyone who took it upon themselves to try to find him work?

A. I know that there was discussion, but it was handled through Boise and personnel.

Q. Were you a party to any such conversation?

A. I don't remember.

Q. Do you recall ever offering Mr. Kirkingburg a trailer-moving job?

A. I don't. I know the hostler position was discussed, but I don't remember offering it to him. I think that, again, that was either Boise or personnel that did that.

Q. I said 'trailer moving" and you said "hostler". Is a hostler the same thing as a trailer mover?

A. Yes.

Q. Could you explain for us, for the record, what a yard hostler does.

A. A yard hostler moves empty trailers into the dock, [125ER] loaded ones out away from the dock, and stages them for dispatch on the road.

Q. Did you know of any yard hostler position that was

available about that time?

A. I'm not sure. You know, I don't remember.
Q. How many yard hostler positions were there?
A. Six.

* * *

[125ER] Q. Do you recall any conversation that you had with Mr. Ed Vandenderen -- I know that's not how you pronounce it, but you know who I'm talking about -- about whether there was any warehouse work for Mr. Kirkingburg back then?

A. I do not.

[126ER] Q. Was it your understanding that the company went by whatever requirements or physical requirements the DOT established?

MS. GORDON: Object to form.

Answer, if you can.

THE WITNESS: They operate by DOT rules and regulations.

BY MR. BUSSE:

Q. And so if the DOT changes those rules and regulations, is it your understanding that Albertson's would, therefore, change its requirements?

A. They don't have to change their requirements. They can have stricter requirements than the Federal DOT.

Q. Well, do you know of anything that Albertson's publishes in the nature of physical requirements that is stricter than the DOT? Or does it just use DOT?

A. I don't know of anything.

Q. As far as your experience with Mr. Kirkingburg, was he a safe driver for you at Albertson's?

A. He was an average driver, a safe driver.

Q. In any prior year, when you received that doctor's certificate concerning the examination that had been given to Mr. Kirkingburg regarding his vision, was there a red flag

raised when you examined that certificate?

A. It could have been the vision.

* * *

[127ER] A. No.

Q. Do you know of any reason why Mr. Kirkingburg could not have fulfilled the requirements of that yard hostler position?

A. He would have to have a valid DOT physical.

[128ER] Q. A valid DOT physical --

A. Yeah.

Q. -- or a valid DOT card?

A. Card, medical card.

Q. That's issued by the doctor; right?

A. Yes.

Q. So if he had the valid DOT card, that should have been sufficient; right?

A. If he had the medical card, yes.

A. Did he have the medical card, at that time? Or do you know.

A. I don't know. You know, he did not pass the vision test, so he would not have had a card.

Q. That's your assumption; right?

A. Yes.

Q. What is your understanding of what his vision was prior to 1992? Do you recall what his vision was in 1992?

A. No, I don't.

Q. Do you recall whether or not he had a valid DOT card in 1991?

A. He did. He was driving for us.

Q. Do you recall whether or not he passed the physical in 1991?

A. If he was driving, yes, he passed.

Q. And in 1990, did he have a valid card?

[129ER] A. Yes.

Q. Did he pass the physical in 1990?

A. Yes.

Q. And in 1988, did he have a valid card?

MS. GORDON: Object. That's outside the scope of his employment period with Albertson's.

BY MR. BUSSE:

Q. You were a truck supervisor in 1988; right?

A. Superintendent, yes.

Q. Truck superintendent. In 1988, did he have a valid card?

MS. GORDON: Object. The plaintiff did not work for Albertson's in 1988, and this is outside -- There's no foundation for this question.

BY MR. BUSSE:

Q. You worked for Albertson's in 1988, did you not, as a truck superintendent?

A. Yes.

MS. GORDON: Mr. Kirkingburg didn't. Your client didn't. He didn't work for Albertson's until 1990.

BY MR. BUSSE:

Q. Do you know, from what you saw, whether or not he had a valid card in 1988?

A. No, I don't.

[130ER] Q. When you were a truck superintendent, what were the differences in your responsibilities?

A. The drivers and the dispatch supervisors was my basic responsibility.

Q. And so were you promoted to transportation manager in 1990?

A. Yes.

Q. What additional bodies or employees came under your supervision at that time?

A. The total department and the maintenance facility, the garage.

Q. When Mr. Kirkingburg was first employed, were you responsible for seeing that that person had a valid DOT card?

A. Yes.

Q. Valid medical certificate?

A. Yes.

Q. Did Mr. Kirkingburg have a valid card and certificate, at the time he was employed?

A. If he was employed as a driver, yes.

Q. That would have been your job at the time, to check that out; right?

A. Yes.

* * *

[131ER] BY MR. BUSSE:

Q. I'm going to show you what's been marked as Exhibit 1. It was marked as Exhibit No. 41 in Mr. Kirkingburg's deposition. And this is the EEO statement of Albertson's where it says, "The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company."

Would you please tell me what undue hardship was caused to Albertson's by reason of the requested accommodation to allow him to drive with a vision waiver?

MS. GORDON: Object to form.

Answer, if you can.

THE WITNESS: The liability.

BY MR. BUSSE:

Q. What liability?

A. Of moving a truck up and down the road with, you know, a vision problem.

Q. Had he gotten into an accident before?

A. I can't answer that. I don't know.

Q. Do you know of any accident that he had, prior to

[132ER] his termination, while a driver at Albertson's?

A. I'm not aware of -- at this time, no.

Q. Is Exhibit 2 an excerpt from the distribution center

driver's manual?

A. Yes.

Q. Exhibit 3, would you regularly get a driving record or motor vehicle driving printouts?

A. Yes.

Q. Is there anything on Exhibit 3 that was disqualifying to Mr. Kirkingburg or was related to his termination, as far as you know?

A. None.

Q. Exhibit 4 was provided to us having to do with a statement of compliance with the policy manual, with a copy of the Portland distribution center personnel policies. Was he terminated for violation of any of the personnel policies, as far as you know?

A. No.

Q. Exhibit 5 is a copy of an incident record that I've received, and it has a warning notice attached to it, and there was something having to do with November 30, '90, dispatch to Spokane. Did this warning have anything to do with his termination?

A. No.

[133ER] Q. Exhibit 18, what is that document, please?

A. That's a medical examiner's certificate.

Q. Does that appear to be a valid DOT certificate? When you say "card", "certificate" and "card", they generally refer to this as a card; right?

A. Yes.

Q. Does that appear to be a valid DOT card?

A. It's -- the only -- It doesn't. It doesn't have the examining doctor's signature on it.

Q. This is the kind of card that you would expect a driver to be issued; right?

A. Yes.

Q. Exhibit 19, do you know whose handwriting that is?

A. No, I don't.

Q. There appears to be the word "peripheral", "Loses peripheral acuity". Do you recall any discussion with Mr. Riddle about that particular subject?

A. No, I do not.

Q. Exhibit 20, can you identify this document?

A. Yes. It's a certification of a road test, a driving test given to each driver that we employ.

Q. Is that your signature?

A. Yes.

Q. So would that have meant that you went on a road [134ER] test with Mr. Kirkingburg and found him to be a safe driver?

A. Yes.

Q. This is something that you're supposed to do yourself; right?

A. That's a DOT requirement, road testing drivers.

Q. Exhibit 21, is this another medical certificate?

A. Yes.

Q. Now, this is 1988, and this is Tillamook. Would you have had that document in your file?

A. No.

Q. Exhibit 22, here's another medical certificate, August 18, 1990. Would you have had that document in your file?

A. Yes.

Q. This is by Robert Eubanks, and that's a doctor that's contracted with Albertson's to fill out those forms; right?

A. Yes.

Q. Where would the original of this document be?

A. In the driver's DOT file.

BY MR. BUSSE:

Q. Exhibit 23, here is February 5th, 1991. This is [135ER] another one of the Eubanks certificates concerning Mr. Kirkingburg; right?

A. Yes.

Q. Do you recall, when it was reported to you that the left was 20/100 with correction, taking any action, at that time, to take Mr. Kirkingburg off the road?

A. I do not, no.

Q. With that test result, was it your understanding that he met the DOT standard, or not?

A. Yes. It was filled out and signed.

Q. What are you looking at?

A. I'm looking at his medical examiner's card.

Q. So as long as they fill it out and sign it, you don't care what's above that? Is that what you're saying?

A. We review those, and we -- you know, we check the blood pressure and look at it. But the doctor does the physical. I'm not a doctor.

Q. Do you have an understanding as to what DOT requires, in terms of visual acuity, with regard to the quality of the eyesight with corrective lenses?

A. There's -- there's regulations in the DOT manual, regulation manual. We refer to them if we have a question.

[136ER] Q. Was it your decision to send Mr. Kirkingburg to the Eubanks Clinic in Gresham for an examination on November 6th?

A. We send all drivers in for recertification to Dr. Eubanks' office on long-term injuries.

Q. Well, is there a policy to that effect, a written policy?

A. It's a policy that we do. All drivers are to be [50SER] recertified from a long-term injury.

Q. Is there a written policy?

A. Not to my knowledge, no.

[137ER] Were you any part of such review?

A. No.

Q. He says, "We appreciate your consistent job performance."

Did you appreciate Mr. Kirkingburg's performance?

A. Hallie was an average driver, he was a good driver.

Q. Exhibit 35 is a note from Scott to Bruce. Who is Scott Jardine?

A. He's the corporate director of transportation.

Q. Where is his office?

A. Boise.

Q. Had you had any other drivers with vision problems besides Mr. Kirkingburg, since becoming the transportation manager at Albertson's?

A. Not to my knowledge, no.

Q. Did you learn, at some point in time, that Mr. Kirkingburg had received a vision waiver?

A. Yes.

Q. And how did you learn that?

A. I don't remember where the information came from.

[138ER] Q. With regard to the vision waiver itself, was there any discussion as to whether or not Mr. Kirkingburg's vision waiver was valid or not? Was that ever an issue, to your knowledge?

A. Not to my knowledge, no.

Q. You were transportation manager as of June 4th, 1993; correct?

A. Yes.

Q. Do you recall having received Scott Jardine's memorandum of that date to all transportation managers on the subject of driver qualifications?

A. No, I don't.

Q. Would you have been routinely included on [139ER] correspondence that was addressed to persons having that job title?

A. Yes.

Q. Now, this is on the subject of DOT waivers. Do you recall any earlier writing than June 4th, 1993, on the subject of waivers?

A. I do not.

Q. It says, "We should continue to apply the minimum standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver."

My question to you is, to your recollection, were you involved in any accommodation of Mr. Kirkingburg in ways other than accepting the DOT waiver?

A. No.

Q. Was there ever any discussion about going to Mr. Kirkingburg, because there appeared to be some inconsistency in his physical records as to what his eyesight exactly was, to go back and get another exam?

A. Not to my knowledge.

Q. Or to try to get his history from his own doctors?

A. Not to my knowledge.

STURGILL EXHIBIT #1

EQUAL EMPLOYMENT OPPORTUNITY POLICY

NONDISCRIMINATION POLICY

The Company is committed to afford all qualified individuals an equal opportunity to pursue employment and advancement opportunities. There shall be no unlawful discrimination against any person or group based upon race, color, creed, religion, national origin, sex, age, disability, or veteran status or other classification that may be protected under the law in training or apprenticeship, advancement, use of facilities, compensation, or any other conditions of employment.

REASONABLE ACCOMMODATION

The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company. The Company will also afford reasonable accommodation for an employee's religious beliefs as required by law.

OBLIGATION

Every member of management will abide by the Company policy of nondiscrimination, equal employment opportunity, and reasonable accommodation. In addition, management shall insure that all notices required by law to be posted, including notices received from the Company or Equal Employment Opportunity Commission. All employees are expected to conduct themselves in a manner that is not offensive as to the sex, race, color, creed, age, religion, national origin, disability or veteran status of any employee.

Federal law prohibits discrimination on the basis of disability when the Americans with Disabilities Act becomes effective on July 26, 1992

STURGILL EXHIBIT #3

PAGE 1

DATE PRODUCED MOTOR VEHICLE DIVISON
07/24/90 89184

LIC NO. 3261558 KIRKINGBURG, HALLIE ELLSWORTH
203 HWY 101 DOB 05/21/38
PO BOX 542 RESTRICT B
GARIBALDI OR 971180000
EXPIRES 05/21/94 LIC TYPE - A MR725526
ENDORSE - TX CDL - YES

** DRIVING RECORD ENTRIES AND STATUS
AS OF 07/24/90 **

CONV 12/28/84 01/08/85 VBR J-TILL 013376 IB
CONV 09/07/88 09/26/88 LK/SFT LD J-TILL 302415 IB

THE UNDERSIGNED, BEING DULY APPOINTED AND
HAVING WITHIN MY CUSTODY THE RECORDS OF
THE MOTOR VEHICLES DIVISION OF THE
DEPARTMENT OF TRANSPORTATION OF OREGON,
HEREBY CERTIFIES THAT THE FOREGOING DRIVING
RECORD COPY IS A CORRECT TRANSCRIPT OF THE
SPECIFIED DATA CONTAINED WITHIN THE DATA
PROCESSING DEVICE OR COMPUTER.

SIGNED UNDER THE SEAL OF THE DIVISION THIS
24TH DAY OF JULY, 1990

ADMINISTRATOR, MOTOR VEHICLES DIVISION

MAIL TO: BY s/ Karl O. Krueger
HALLIE KIRKINGBURG
203 HWY 101
GARIBALDI OR 97118

STURGILL EXHIBIT #16

STURGILL EXHIBIT #17

Albertsons® PHYSICAL EXAMINATION FORM
(MOTOR VEHICLE TRANSPORTATION REQUIREMENTS)

To Be Filled In By Examining Physician (Please Print).

Driver's Name Hallie Kierkingburg New Certification

Soc. Sec. No. 222 74-021 Date of Birth 5/2/88 Recertification

Age 54 W-434
18 21-1

Health History

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Asthma	
Arthritis disease	
Tuberculosis	
Seizures	
Convulsions	
Diabetes	

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Nervous Stomach	
Arthritic Fever	
Muscular Disease	
Cervical Spondylosis	
Gastroenteritis (Diarrhea)	

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Head or Facial Injuries	
Severe, fits, convulsions, or fainting	
Extensive confinement by illness or injury	
Any other nervous disorder	
Suffering from any other disease	
Permanent defect from illness	

State of injury

If answer is any of the above it not explain Part 1 Section D 6.6.8a.1.2, et al.

General appearance and development: Good Ex 100 Year

Vision: Far Distance Right 20/ Right 20/ 20 Left 20/ 200 See bird -
 Without correction lenses
 Evidence of disease or injury Right 0 Left Extrinsic inflammatory
 Color Test

Hearing: Horizontal field of vision Right 180° Left 180°
 Right ear Normal Left ear Normal
 Disease or injury None None
 If audiometer is used to test hearing: October 1988 at 500 Hz at 1,000 Hz at 2,000 Hz

Audiometer test: Throat: Throat:

Respiratory: Heart RR 55
 If organic disease is present, is it fully compensated? Yes
 Blood pressure Systolic 177 Diastolic 72 Normal
 Pulse 80 Immediate after exercise 70
 Lung Normal

Gastrointestinal: Stomach Normal Abnormal masses None Tenderness None
 Bowel Normal Normal Normal Normal
 Hepatomegaly None Unusual discharge None

Genito-Urinary: Bladder Normal
 Urethra Normal Normal Normal

Respiratory: Pupillary Normal Right 6 Left 6 L 6 R 6
 Accommodation Right Normal Left Normal
 Knee/leg: Right Normal Normal Increased Normal
 Left Normal Normal Increased Normal

Extremities: Remarks: Upper Normal Lower Normal Spine Normal
 Laboratory and Urine: Sanc. Gr. 100 Normal Normal Normal
 Other Laboratory Data (Sediment, etc.) None None None
 Radiology or X-ray None Electrocardiogram Normal

MEDICAL EXAMINER'S CERTIFICATE
 I certify that I have examined
Hallie Kierkingburg
 On NOV 05 1992 at 10:00 AM at Albertsons
 Douglas Eubanks DO 100 Normal
 NOV 12 1992 Normal Normal
 (Date of Examination)

The following is to be completed after when the visual test is conducted by a licensed optometrist.

(Name of Optometrist (Print))
Hallie Kierkingburg
 (Address of Optometrist)
 (Signature of Optometrist)

DEPOSITION EXHIBIT
 17 9-15-95
 (Date of Deposition)

INSTRUCTIONS ON REVERSE SIDE

132 - PL CONCISE STATEMENT OF MATERIAL FACTS IN DISPUTE

STURGILL EXHIBIT #20

CERTIFICATION OF ROAD TEST
DRIVERS NAME Hallie Kirkingburg
SOCIAL SECURITY NO 270 34 2921
OPERATOR'S OR CHAUFFEURS LICENSE NO 3261558

TYPE OF POWER UNIT 1988 Kenworth

TYPE OF TRAILER(S) 1980 Utility 50'

IF PASSENGER CARRIER, TYPE OF BUS

THIS IS TO CERTIFY THAT THE ABOVE NAMED
DRIVER WAS GIVEN A ROAD TEST UNDER MY
SUPRVISION ON Theodore Sturgill Aug. 20 19 90

CONSISTING OF APPROXIMATELY 18 MILES OF
DRIVING
IT IS MY CONSIDERED OPINION THAT HIS DRIVER
POSSESSES SUFFICIENT DRIVING SKILL TO OPERATE
SAFELY THE TYPE OF COMMERCIAL MOTOR
VEHICLE LISTED ABOVE.

s/ Theodore M. Sturgill

Albertsons 17505 NE San Rafael Portland OR

STURGILL EXHIBIT #21

PHYSICAL EXAMINATION OF DRIVERS

STURGILL EXHIBIT #22

STURGILL EXHIBIT #23

STURGILL EXHIBIT #24

Tillamook Vision Center

Eric Halperin, O.D.

Beatrice Halperin Michel, O.D.

November 9, 1992

To Whom It May Concern:

RE: KIRKINGBURG, Hallie (SS# 270-34-2921)

Mr. Kirkingburg returned to my office today for a vision examination to provide the information needed for his vision waiver. I last saw Mr. Kirkingburg January 24, 1991 for a comprehensive vision examination.

At both visits, Mr. Kirkingburg's visual acuities with spectacle correction were 20/20 right eye and 20/200 left eye. His current glasses provided his best spectacle correction. Posterior and anterior ocular health was within normal limits for both eyes.

The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. In Mr. Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). Amblyopia is said to exist if the vision is 20/30 or worse with best correction.

Mr. Kirkingburg has had amblyopia in the left eye since childhood. Mr. Kirkingburg's visual condition is stable and has not worsened since his last vision examination and is not expected to change in the future.

As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive.

If further information or clarification is necessary please contact me by phone to facilitate resolution of this matter.

Sincerely,

/ Beatrice Michel

Beatrice Michel, O.D.

STURGILL EXHIBIT #25

On 11/20/92 called Hallie Kirkingburg
Failed his DOT physical and a waiver would not granted.

s/ Ted Sturgill

11-20-92 4:45PM

Ted Sturgill called Hallie Kirkingburg and informed him that he did not pass the D.O.T. physical and we would not sign a waiver on his failed eyesight.

s/ Bill Fronce
11/20/92

STURGILL EXHIBIT #26



EMPLOYEE STATUS REPORT

825R	921	6107494	2
Hallie Kirkingburg		270-34-2821	
Driver		Portland Out Ctr	
TERMINATION			
MONTH	DAY	YEAR	Have all orders to Company been paid? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
302	1	20 92	Have all uniforms been returned? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
469	4	1 8	Have all keys been returned? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
RATE CHANGE			
TERMINATION DATE	TERMINATION REASON CODE	ANNUAL <input type="checkbox"/> OTHER <input type="checkbox"/>	Have all uniforms been returned? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
REASON FOR RATE CHANGE			
51			
JOB CLASS CHANGE			
TITLE CHANGE			
TRANSFER <input type="checkbox"/> LOANER <input type="checkbox"/> <small>1. Perform work for a regular employee of another firm 2. Use regular and excess of current workload</small>			
TERMINATION DATE	TERMINATION REASON CODE	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>
TERMINATION DATE	TERMINATION REASON CODE	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>
TERMINATION DATE	TERMINATION REASON CODE	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>	REGULAR <input type="checkbox"/> TEMPORARY <input type="checkbox"/> FULL TIME <input type="checkbox"/> PART TIME <input type="checkbox"/>
139 - PL CONC STATEMENT OF STATED OR FACTS IN DISPUTE		DEPOSITION EXHIBIT	AA 11/20/92

REASONS FOR TERMINATION	
Check Appropriate Box	
REDUCTION IN FORCE <input type="checkbox"/> 101 Reduction in Force (Permanent) <input type="checkbox"/> 102 Reduction in Force (Temporary) <input type="checkbox"/> 103 Temporary <input type="checkbox"/> 104 _____	
VOLUNTARY QUIT <input type="checkbox"/> 301 To Assume Other Employment (What Company) _____ <input type="checkbox"/> 302 To Learn of Other Employment (What Company) _____ <input type="checkbox"/> 303 To Learn the Area <input type="checkbox"/> 304 To Assume School <input type="checkbox"/> 305 To Get Married <input type="checkbox"/> 306 To Assume Household Duties <input type="checkbox"/> 307 Military Service <input type="checkbox"/> 308 Leave of Absence Required <input type="checkbox"/> 309 Disenchantment of Job <input type="checkbox"/> 310 Disagreement with Working Conditions <input type="checkbox"/> 311 Retirement <input type="checkbox"/> 312 Pregnancy <input type="checkbox"/> 313 Employment in General <input type="checkbox"/> 314 Family Member Retired or Death <input type="checkbox"/> 315 Transportation Problem <input type="checkbox"/> 316 Other _____	
DEATH <input type="checkbox"/> 401 Employee Death	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
EXPLAIN ALL TERMINATIONS IN DETAIL <p>Wasn't able with the general manager say and able failed his DOT physicals in 1992. He was terminated by telephone by the Transportation and Personnel on 11/20/92</p>	
<small>14. PL CONCISE STATEMENT OF MATERIAL FACTS IN DISPUTE</small>	

STURGILL EXHIBIT #29

DARIO BELL
 Director of Corporate Safety
 250 E. Park Center
 Boise, Idaho 83702

Dec. 18, 1992

(RE) D.O.T. Files "Request for All D.O.T. Records & Report
 Facts:

- A. Employed Aug. 20, 1990 as Driver - Passed All Required Medical - Driving - PRC: Employment Tests.
- B. No Tickets - Accidents or Reprimands while Employed:
- C. On Job Injury Dec. 3, 1991 - Released without restriction Nov. 3, 1992. From Albertson's Recommended Doctor's.
- D. Was required to go to another "Albertson" Doctor. Nov. "Note" "Eubanks Clinic in Gresham, OR have given me 3 DOT physicals." Was sent to Another "Eubanks" Clinic Dr. said you need "vision waiver." I explained vision had not changed in 54 years except for bifocals.
- E. Frank Riddle - Ted Sturgil told me on Nov. 6, 1992 Vision Waiver was to be "Corporate Decision" - Ted Sturgil called Fri. Nov. 20, 1992 4:35PM said No Waiver to be Accepted. Ask for Paperwork and he said none would be sent.
- D. Charlie "Personnel" Director 8252 was sent notice for Records - Reports - Notes, Etc. "Received Nothing"
- E. Called Director of Labor Relation in Boise. He said he would look into problem. And call me back by Wed. Nov. 25. Have not been called back.
- F. Local 305 sent letter to Bruce on Nov. 30, 1992. Asking for reinstatement. - No Response this date.
- G. Request release of information in all D.O.T. Files -

Medical Reports - Any and all Notes - Memos - FAX
concerning Author of this Letter.

Sincerely,

s/ Hallie Kirkingburg

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

copy sent to:

Linda Taylor
Federal Programs Manager
U.S. Dept. of Transportation
Koin Center, Suite 600
222 SW Columbia St.
Portland, OR 97201

STURGILL EXHIBIT #32

Albertson's Inc.
17505 NE San Rafael St.
Box 30779
Portland, OR 97230

December 28, 1992

Transportation and/or Personnel Manager:

RE: D.O.T. Request for Information:

Per "Eubanks Clinic" Statement that I needed a "Vision Waiver." I submitted a Application on Nov. 12 1992, (Before the Termination phone call on Nov. 20, 1992) to Department of Transportation, Vision Waiver Program. More information is needed to complete that application. This must be supplied by "Albertsons" on their stationary. A time Limit of 30 Days from the date I received the D.O.T. is required, Dec. 28, 1992 is the date I received their letter. I am requesting copies of any information sent to D.O.T. for my files. Please review the enclosed letters carefully.

Sincerely:

s/ Hallie Kirkingburg

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

cc: Linda Taylor
Federal Programs Manager
US D.O.T.
222 SW Columbia St.
Portland, OR 97201

STURGILL EXHIBIT #32 CONT.

U.S. Department
of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Highway
Administration

Dear Applicant:

We have reviewed your application for waiver of the Federal Highway Administration's vision requirements for drivers of commercial motor vehicles operated in interstate commerce. We are unable to determine whether you meet the conditions as outlined in the recent Federal Register notices. Some of the required information was not provided with your application.

We have provided you with a list identifying the additional information needed to process your request for waiver. Please note that you need to obtain this information and send it as quickly as possible to:

Vision Waiver Program
400 7th Street, S.W.
Washington, D.C. 20590

The deadline for submitting this information is 30 days from the date you receive this notice. You may be assured that your resubmission will be handled quickly.

Please note that you have been assigned a control number. It appears near the top of the enclosed list. Please place this number on each document you submit. If the requested documentation is not received within 30 days upon receipt, no further action will be taken by this agency.

Thank you for your cooperation.

Sincerely,

s/

James E. Scapellato, Director
Office of Motor Carrier Standards

STURGILL EXHIBIT #32 CONT.

U.S. Department
of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Highway
Administration

**VISION WAIVER APPLICATION:
Request for Missing Information**

Your application is missing one or more items and/or specific information needs clarification. Please submit that information, as well as this letter, as soon as possible in order to expedite your application for the vision waiver. Please note your application number and write it on the top of each page you submit.

Application Number: 3369-Kirkingburg

December 21, 1992

Please submit the following information:

Employment Verification

I. If you are/were employed by another person/company and you currently possess a valid license to operate a CMV:

- Submit a signed, employer verification, on company stationary, that you have driven a CMV *for the 3 years immediately preceding the date of your application for this waiver*. This letter must certify that you drive CMV's for this company, the date you began driving CMV's, and whether or not you are still employed driving CMV's. If you are not currently driving CMV's for this company due to your visual deficiency, your employer must specify this.

Since you have been leased to another company and you are not your own motor carrier, please provide employer verification.

Driver Record

- Submit a more recent motor vehicle report (the one you submitted was dated in March). Please make sure that this is an official State issued report and that it also *covers the entire employer verified 3 year period of CMV operation up to the present*.

If there are any violations or accidents on your record:

- Submit official documentation that distinguishes the type of vehicle operated (personal vehicle or CMV) when each violation listed on your MVR occurred.
- Submit a copy of the accident report for each accident shown on your MVR. If you were operating a commercial vehicle and were issued a citation, and there was property damage involved, you must provide official documentation as the dollar amount of that damage.

STURGILL EXHIBIT #34

Albertsons

January 15, 1993

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

Dear Mr. Kirkingburg:

This is in reply to your December 18, 1992 letter to Dario Bell and is in follow-up to our recent telephone conversation.

We have reviewed your work history with Albertson's during the past 2 years. We appreciate your consistent job performance. We very much regret that you are unable to continue your employment with Albertson's as a driver because of your vision.

The Department of Transportation Regulations, which set forth the eligibility requirements of drivers, provides:

- A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in §391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle. A person is physically qualified to drive a motor vehicle if that person ... has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize

the colors of traffic signals and devises showing standard red, green, and amber." §391.41(a) and (b)(10)

Dr. Douglas Eubanks advised our Transportation Department on November 6, 1992 that the vision acuity of your left eye cannot be corrected to better than 20/200. You were disqualified from driving pursuant to the DOT Regulations, because of Dr. Eubanks' finding.

We genuinely hope that your vision acuity is corrected in the future so that you may qualify to drive. I have enclosed a copy of the report of Dr. Eubanks for your reference.

If you need additional information or if you have any questions, please do not hesitate to call me collect at 208/385-6385.

Sincerely,

s/ Bruce Paolini

Bruce Paolini
Vice President, Labor Relations
Labor Relations Department

BPP/lnw/1152

Enclosure

cc: Frank Riddle
Scott Jardine
Charlie Norris

ALBERTSON'S INC/GENERAL OFFICES/250
PARKCENTER BLVD/BOX 20/BOISE, IDAHO 83726
208-385-6200

STURGILL EXHIBIT #35

TO Bruce AT _____
FROM Scott DATE 1/29/93
SUBJECT Attached WHEN NEEDED Taken _____

For Your Information
X Please Handle As Req.
What Action Has Been
Note & Return With Comments
Please Take Up With Me
Per Phone Conversation
For Your Approval

This is the driver with the vision problem in Portland.
Call if I can be of help.

Scott

REPLY

Albertsons

AVOID ORAL INSTRUCTIONS

STURGILL EXHIBIT #35 CONT.

**LAW OFFICES OF
PETER O. HANSEN**
1020 SW TAYLOR ST., SUITE 700
PORTLAND, OREGON 97205-2512
(503) 228-6040 FACSIMILE (503) 226-0457

1134 MAIN STREET
P.O. BOX 415
TILLAMOOK, OREGON 97141
(503) 842-8772 FACSIMILE (503) 842-8821

January 21, 1993

Dario Bell
Director of Corporate Safety
250 E. Park Center
Boise, ID 83702

RE: HALLIE KIRKINGBURG, Claimant

Dear Mr. Bell:

This office has been retained to represent Claimant regarding his workers' compensation claim. Please provide our office with copies of the following documents:

(1) D.O.T. files

I have enclosed a previous request from our client along with a copy of our information release.

If you have any questions, please do not hesitate to contact our office.

Very truly yours,

s/ Wanda Pickett

Wanda M. Pickett for
MARILYN K. JONES, Legal Assistant

STURGILL EXHIBIT #36

U.S. Department
of Transportation

400 Seventh St. SW
Washington, D.C. 20590

Federal Highway
Administration

No. V3369

February 25, 1993

Mr. Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

Dear Mr. Kirkingburg:

Your application for a waiver from the vision requirements of 49 CFR 391.41 (b)(10) has been approved. The waiver authorizes you to operate a Commercial Motor Vehicle (CMV) in interstate commerce.

Your waiver is enclosed. Please carry it with you at all times while driving a CMV.

Please read the waiver and note the conditions required of you to retain your waiver status. Pay particular attention to the conditions set forth on the reverse side of the waiver. These are reporting requirements you must fulfill to keep your waiver. The reports should be mailed to:

Vision Waiver Program
400 Seventh Street, SW
Washington, D.C. 20590

If you have any questions about your waiver, please write to
the address above.

Sincerely yours,

s/ Thomas P. Kozlowski

Thomas P. Kozlowski, Acting Director
Office of Motor Carrier Standards

STURGILL EXHIBIT #37

FEDERAL HIGHWAY ADMINISTRATION

VISION WAIVER

[From the requirements of 49 CFR 391.41(b)(10)]

Name: Mr. Hallie Kirkingburg **Waiver Number:** V3369

SSN: 270-34-2921 **DOB:** 05-21-38

Address: 4780 Juno Hill **Effective Date:** 02-25-93
Tillamook, OR 97141

Expiration Date: 02-25-96

Driver's License Number and State of Issuance:
3261558 OR

AUTHORITY: 49 U.S.C. App. 2505 (f)

***THIS WAIVER DOCUMENT MUST BE CARRIED BY
THE INDIVIDUAL TO WHOM IT HAS BEEN ISSUED
WHILE OPERATING A COMMERCIAL MOTOR
VEHICLE (CMV) AND PRESENTED UPON THE
REQUEST OF ANY LEGALLY AUTHORIZED
ENFORCEMENT OFFICIAL.***

This waiver authorizes the above named individual to operate a CMV in interstate commerce under the conditions set forth below. This waiver is subject to periodic review by the Federal Highway Administration. Any failure to comply with the conditions of the waiver stated below will be cause for immediate revocation of this authorization.

CONDITIONS: Each individual shall:

(1) Be medically examined and certified in accordance with 49 CFR 391.43 as physically qualified to operate a CMV, except for the vision requirement being waived by this document;

(2) Obtain a medical examiner's certificate, from a health care professional, that bears the statement "**Medically unqualified unless accompanied by a Federal vision waiver;**"

(3) Provide the medical examiner's certificate upon request of any legally authorized enforcement official; and

(4) Obtain and display the appropriate driver's license from your State of domicile and comply with any restrictions placed thereon regarding required use of eyeglasses, mirrors or other visual aids.

Issued by:

s/ Thomas R. Kozlowski
(for) E. Dean Carlson
Executive Director
Federal Highway Administration

DRIVER HISTORY: Each individual shall, for the three years prior to the effective date of this waiver:

(1) Have no suspensions or revocations of a driver's license for the operation of any vehicle;

(2) Have no involvement in a reportable (49 CFR 394.3) accident in which a citation was issued for a moving traffic violation;

(3) Have no convictions for a disqualifying offense or more than one conviction for serious traffic violations while driving a commercial motor vehicle during the three-year period, which disqualified or should have disqualified that individual under the provision of 49 CFR 383.51; and

(4) Have no more than two convictions for any other moving traffic violations while operating a commercial motor vehicle.

REPORTING REQUIREMENTS: There are six reporting requirements which must be met in full during the term of this waiver. Each driver is required to:

(1) Report any citation for a moving violation involving the operation of a CMV within 15 days following the issuance;

(2) Report the judicial/administrative disposition of such charge within 15 days following notice of disposition;

(3) Report any accident involvement whatsoever while operating a CMV within 15 days following the accident (include Federal, State, insurance company, and/or motor carrier accident reports);

(4) Submit documentation of an annual examination by an ophthalmologist or an optometrist at least **15 days** before the annual anniversary of the effective date of the waiver. The documentation must contain the medical specialist's certification that the individual is still eligible under the waiver's vision criteria and the vision deficiency has not worsened since the last vision examination required by this waiver; and

(5) Report by the 15th calendar day of each month: (not including the month in which this waiver becomes effective)

- (a) The number of miles driving a CMV during the preceding month;
- (b) The number of daylight hours and the number of nighttime hours driving a CMV during the preceding month; and
- (c) The number of days you did not operate a CMV during the preceding month.

This report must be submitted each month even if a CMV was not operated during that period.

(6) Report immediately all changes concerning: address, telephone, employment and type of vehicle driven.

All documentation described in items (1) through (6) above, must be mailed to:

**Vision Waiver Program, 400 7th Street SW, Washington,
D.C. 20590**

FAILURE TO SUBMIT TIMELY REPORTS WILL BE
CAUSE FOR CANCELLATION OF THIS WAIVER.

STURGILL EXHIBIT #39

**Dairy, Bakery & Food Processors, Industrial,
Technical & Automotive, Local Union No. 305**

Affiliated with The International Brotherhood of Teamsters
1870 N.E. 162nd Avenue • PHONE (503) 251-2305
• FAX (503) 251-2301
PORTLAND, OREGON 97230

FAX TRANSMITTAL
TEAMSTER LOCAL UNION NO. 305
FAX NO. 251-2301

DATE 3-11-93
TO Bruce Paolini
Labor Relations

FROM Roy Dwiggins
305
NO. OF PAGES 5 (INCLUDING THIS
TRANSMITTAL)

COMMENTS
What is his status?

(***Transmitted pages omitted in printing here -- printed
earlier in full - Sturgill Exhibits 34, 36 and 37 respectively)

STURGILL EXHIBIT #40

***Dairy, Bakery & Food Processors, Industrial,
Technical & Automotive, Local Union No. 305***

Affiliated with The International Brotherhood of Teamsters
1870 N.E. 162nd Avenue • PHONE (503) 251-2305
• FAX (503) 251-2301
PORTLAND, OREGON 97230

March 19, 1993

Bruce Paolini
Vice President
Labor Relations Dept.
Albertsons, Inc.
Box 20
Boise, Idaho 83726

RE: Halli Kirkenburg

Dear Bruce;

Please be advised that we are disputing the fact that your Company refused to return Mr. Kirkenburg to work following his submitting proof of compliance with D.O.T. requirement for vision.

We are requesting that Mr. Kirkenburg be reimbursed for all monies lost since March 11, 1993. This is the date that you received the FAX from this office containing Mr. Kirkenburg's vision waiver.

Please respond immediately to this matter.

Sincerely,

s/ Roy Dwiggins
Roy A. Dwiggins
Business Representative

STURGIL EXHIBIT #41

Albertsons

May 17, 1993

Roy Dwiggins
Business Representative
Teamsters Local 305
1870 N.E. 162nd Avenue
Portland, OR 97230

RE: H. Kirkingburg

Dear Mr. Dwiggins:

I am writing to you regarding the grievance filed by Mr. Kirkingburg. As a compromise, on a non-admission and non-precedent setting basis, the company is willing to offer Mr. Kirkingburg employment as a yard hostler. If Mr. Kirkingburg is interested, he should contact Mr. Frank Riddle at the Portland Distribution Center.

Very truly yours,

s/ Dona
Dona Adams Pike
Labor Relations Manager
Labor Relations Department

DAP:ej

cc: Frank Riddle

STURGILL EXHIBIT #43

Albertsons

TO: All Transportation Managers
FROM: Scott Jardine - Corporate Director of Transportation
DATE: June 4, 1993
SUBJECT: Driver Qualifications

Albertson's owes it to its customers, employees and the public to have the safest possible driver workforce.

Part 391 of the Federal Motor Carrier Safety Regulations addresses minimum qualifications of drivers as follows:

"The rules in this Part establish minimum qualifications for persons who drive motor vehicles as, for, or on behalf of motor carriers..."

Recently, the DOT has issued waivers which allow drivers who cannot meet the minimum qualifications of the DOT to operate motor vehicles. DOT waivers mean drivers who cannot meet DOT minimum standards are on the road.

We should continue to apply the minimum standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver.

If you have questions about our duty to reasonably accommodate individuals with a disability, please contact Dona Adams Pike at 208-385-6391. If you have questions about this memo, please call me.

Scott
s/ Scott

cc: Tom Brother
Mike McCarthy
General Managers/Directors
Bruce Paolini
Dona Adams Pike

STURGILL EXHIBIT #47

OVERNIGHT

Albertsons

August 23, 1993

Don Alcocke
Oregon Bureau of Labor & Industries
800 N.E. Oregon Street, #32
Portland, OR 97232

RE: HALLIE KIRKINGBURG

Dear Mr. Alcocke:

I am writing in response to the charge of discrimination filed by Mr. Kirkingburg with the Equal Employment Opportunity Commission and the Bureau of Labor and Industries alleging employment discrimination on the basis of disability. Albertson's adamantly denies that it discriminated against Mr. Kirkingburg on the basis of his disability or any other basis prohibited by law. Albertson's affirmatively states that it offered employment to Mr. Kirkingburg for which he was qualified, but he declined to accept the positions offered.

Mr. Kirkingburg began his employment with Albertsons' Portland Distribution Center as a Driver on August 21, 1990. In his charge, Mr. Kirkingburg alleges that he suffered a compensable injury on December 3, 1991, and was released to return to work on November 3, 1992. He also alleges that Albertson's refused to reinstate him and demanded that he report for a new physical. These facts are not in dispute. Drivers at the Portland Distribution Center are required to be Department of Transportation (DOT) certified. It is common practice to refer workers who have been off work for such a

lengthy period of time for a DOT physical. A copy of Part 391 of the Federal Motor Carrier Safety Regulations is enclosed for your information.

In order to meet DOT vision requirements, Drivers must have a distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses; distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses; field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

When Mr. Kirkingburg was released to return to work, in keeping with DOT requirements, he was referred to Dr. Eubanks for a DOT physical. Based on the DOT physical, Mr. Kirkingburg did not meet the minimum visual requirements for DOT certified drivers. In fact, according to Mr. Kirkingburg's DOT physical examinations, his vision has deteriorated substantially. Contrary to his statement in the charge that his vision has not changed. On August 18, 1990, Mr. Kirkingburg's visual acuity was 20/20 in his right eye and 20/70 in his left eye, with a binocular acuity for both eyes of 20/25. On November 6, 1992, Mr. Kirkingburg's visual acuity was 20/20 in his right eye and 20/200 in his left eye. Thus, Mr. Kirkingburg's vision in his right eye had deteriorated to the point that neither his separate distant visual acuity or his corrected binocular visual acuity met DOT standards. Based upon the results of the November, 1992, medical examination, Albertson's refused to reinstate Mr. Kirkingburg as a Driver. Copies of the physicals are enclosed.

Recently, DOT implemented a pilot program to study drivers with vision problems compared with drivers who meet DOT minimum vision requirements in anticipation of possible

modification of DOT requirements. Under this program, waivers are available to drivers who meet certain standards. A copy of the regulations regarding the pilot program is enclosed for your information.

Dr. Eubanks, the doctor who performed the DOT physical, advised Mr. Kirkingburg that he may be able to obtain a DOT waiver. Mr. Kirkingburg did, in fact, apply for and receive a DOT vision waiver. Mr. Kirkingburg did not receive and transmit the DOT waiver to Albertson's until February 23, 1993. Albertson's declined to accept the DOT vision waiver because of concerns regarding safety, but offered to employ Mr. Kirkingburg in two separate positions for which we deemed him to be qualified. The first position was a Yard Hostler. The second position was working in the shop. Mr. Kirkingburg declined to accept either of these positions.

Mr. Kirkingburg alleges that he was terminated in November, 1992. This is not true. Mr. Kirkingburg was only terminated after he declined to accept either of the positions which were offered to him as an accommodation to his disability.

Albertson's does not employ drivers who do not meet minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does not mean that he meets the minimum qualifications of a DOT driver. Rather, it means that based upon his driving record and the fact that he has acceptable vision in one eye, DOT will allow him to drive so that he may participate in their study. Albertson's has not and will not accept DOT vision waivers because of safety considerations. In the alternative, Albertson's may offer to employ incumbent drivers who do not meet the minimum DOT requirements, in available positions, for which they are qualified, as an accommodation to their disability.

The Americans with Disabilities Act does not require companies to employ individuals who are not "otherwise qualified." The Act requires employers to make reasonable accommodation to the disabilities of individuals, but allows the employer to select the accommodation. In this case, Mr. Kirkingburg was offered reinstatement in two position with comparable pay and comparable hours. Certainly, the Company met its legal obligation to reasonably accommodate Mr. Kirkingburg's disability by offering him alternative positions. Mr. Kirkingburg does not have the right to choose the accommodation. By declining the reasonable accommodation, he in effect voluntarily terminated his employment.

If you wish to interview any Albertson's employees, please advise so that I may make the arrangements. I wish to be present during all interviews. Also, if you require additional information, please direct the request to me.

Because the evidence is undisputed that Mr. Kirkingburg no longer meets DOT minimum requirements and because Mr. Kirkingburg has declined the reasonable accommodations offered to him, this charge should be dismissed.

Very truly yours,

s/ Dona Adams Pike

Dona Adams Pike
Labor Relations Manager
Labor Relations Department

Enc.

cc: Frank Riddle
Ted Sturgill

STURGILL EXHIBIT #48

**FAX AND REGULAR
MAIL**

Albertsons

February 28, 1994

Irene Zentner
Senior Investigator
Bureau of Labor and Industries
800 NE Oregon St. #32
Portland, OR 97232

**RE: Kirkingburg vs. Albertson's, Inc.
Case # ST-EM-DP-930611-2338**

Dear Ms. Zentner:

I am writing to confirm our earlier telephone conversation regarding the above-captioned matter.

In earlier correspondence, you requested information regarding the positions which were offered to Mr. Kirkingburg after he received notification of his termination, including the dates the positions were offered, salaries, duties, minimum qualifications and his responses as well as identification of any other positions which became vacant between November 20, 1992 and May 17, 1993 for which he was qualified.

Regarding the positions which were offered to Mr. Kirkingburg, the position of Yard Hostler was offered on May 17, 1993 by letter addressed to Roy Dwiggins, Business Agent for Local 305. A copy of the letter is enclosed. The salary is the same as the Driver's salary. The duties include moving

trailers and generally involve the same duties as Drivers, however, Yard Hostlers usually work in the yard as opposed to on the highway. When the position of Yard Hostler was offered, Mr. Kirkingburg did not immediately accept it, and although the Company had intended to restrict Mr. Kirkingburg to driving in the yard only, we became concerned because the position does require DOT certification. Accordingly, the offer of this position was withdrawn.

The second position which Mr. Kirkingburg was offered was the position of Tire Mechanic. This position was offered to Mr. Kirkingburg by telephone by Charles Norris, Personnel Manager at the Portland Distribution Center. Mr. Norris advises that this conversation took place sometime between May 7, 1993, when the position came open and June 21, 1993 when the position was filled. The driver's salary was \$14.21 per hour. Tire Mechanic's salary is \$13.05 per hour. Mr. Norris did not discuss with Mr. Kirkingburg what the salary would be as Mr. Kirkingburg immediately rejected the position and indicated that he did not want to take any position other than a driving position. The duties of a tire mechanic are to maintain and track tire usage on all equipment, change tires, order tires under the supervision of the Superintendent. It does require that the employee be able to lift tires in some cases and it does require that the employee have a valid driver's license because it sometimes necessary to travel to the equipment for repair. DOT certification and a commercial license are not required. Mr. Kirkingburg rejected this job offer in the telephone conversation stating "Hell no, I want to be a driver. I'm not a damn tire mechanic." Mr. Norris is available to sit for an interview at your convenience.

Regarding the positions open between November 20, 1992 and May 17, 1993, I am obtaining that information and should be able to provide it to you this week.

Very truly yours,

s/ Dona Adams Pike

Dona Adams Pike
Labor Relations Manager
Labor Relations Department

DAP:slt
Enclosure